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No. 269 Miscellaneous

In the Supreme Court of the United States

OCTOBER TERM, 1948

UNITED STATES OF AMERICA, PETITIONER

v.

NATIONAL CITY LINES, INC., PACIFIC CITY LINES, INC., FIRESTONE TIRE & RUBBER COMPANY, GENERAL MOTORS CORPORATION, PHILLIPS PETROLEUM COMPANY, MACK MANUFACTURING CORPORATION, STANDARD OIL COMPANY OF CALIFORNIA, AND FEDERAL ENGINEERING CORPORATION

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION, AND MOTION FOR LEAVE TO FILE

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 269, MISCELLANEOUS

UNITED STATES OF AMERICA, PETITIONER

v.

NATIONAL CITY LINES, INC., PACIFIC CITY LINES, INC., FIRESTONE TIRE & RUBBER COMPANY, GENERAL MOTORS CORPORATION, PHILLIPS PETROLEUM COMPANY, MACK MANUFACTURING CORPORATION, STANDARD OIL COMPANY OF CALIFORNIA, AND FEDERAL ENGINEERING CORPORATION

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI

Now comes the Acting Solicitor General and respectfully moves this Court for leave to file the annexed petition for writ of certiorari under Section 1651 of Title 28, United States Code (formerly Section 262, Judicial Code, 28 U. S. C. 377), directed to the District Court of the United States for the Southern District of California, Central Division, to review an order and judgment of that court entered on October 28, 1948, and more particularly described in the petition, and for such other and further relief as may be just and proper.

GEORGE T. WASHINGTON,
Acting Solicitor General.

DECEMBER 1948.

816204—48——1.

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PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

The Acting Solicitor General prays that a writ of certiorari be issued to review a judgment and order, entered on October 28, 1948, by the United States District Court for the Southern District of California, Central Division, transferring the civil proceeding which was pending in that court, and in which the United States charged the above-named respondents with violations of the Sherman Act, to the United States District Court for the Northern District of Illinois, Eastern Division.

OPINION BELOW

The opinion of the district court rendered on respondents' motions to transfer the action has not yet been reported. A copy of this opinion is attached to this petition as Exhibit B of the Appendix to the petition (*infra*, pp. 20–43). An opinion by this Court and an opinion by the district court, rendered at prior stages of the present proceeding, are reported, respectively, in 334 U. S. 573 and 7 F. R. D. 456.

JURISDICTION TO REVIEW

The date of the order and judgment of the district court sought to be reviewed is October 28, 1948.[1]

The jurisdiction of this Court is invoked under Section 1651 (a) of Title 28, United States Code (formerly Section 262 of the Judicial Code, 28 U. S. C. 377), as enacted by Public Law 773, 80th Cong., 2d Sess.

Section 2 of the Act of February 11, 1903, as amended (15 U. S. C. 29), confers upon this Court exclusive appellate jurisdiction of civil suits brought by the United States under the

[1] The court signed the judgment and order on October 27, 1947, and the clerk entered judgment on October 28, 1947. Under Rule 58 of the Federal Rules of Civil Procedure the latter date constitutes the entry of judgment.

Sherman Act. Grant of the common law writ of certiorari, as authorized by Section 1651 (a) of Title 28, United States Code, is sought in aid of such exclusive appellate jurisdiction.

The following decisions sustain the power and jurisdiction of this Court to review the order and judgment review of which is herewith sought:

United States Alkali Export Assn., Inc. v. *United States*, 325 U. S. 196

DeBeers Consolidated Mines, Ltd. v. *United States*, 325 U. S. 212

The special and unusual circumstances which warrant exercise by this Court of its discretionary power to issue the common law writ of certiorari, as requested in this petition, are set forth later under the heading "Reasons for Granting the Writ" (*infra*, pp. 9–18).

QUESTION PRESENTED

The single question which the Government seeks to have this Court review is whether Section 1404 (a) of Title 28, United States Code, as enacted by Public Law 773, 80th Cong., 2d Sess., applies to proceedings under the antitrust laws governed by the venue provisions of Section 12 of the Clayton Act. The question, otherwise stated, is whether Section 1404 (a) amends Section 12 of the Clayton Act and takes away the right which that section gives to the plaintiff—to have his suit

tried in any district "specified by the statute and selected by the plaintiff"[2]—by authorizing the court of the district in which the action was instituted to transfer it to any other district where it might have been brought.

STATUTES INVOLVED

Section 12 of the Act of October 15, 1914, 38 Stat. 730, 15 U. S. C. 22, known as the Clayton Act, provides as follows:

> That any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

The Act of June 25, 1948, Public Law 773, 80th Cong. 2d Sess., which is entitled "An Act To revise, codify, and enact into law title 28 of the United States Code entitled 'Judicial Code and Judiciary'," provides in Section 1:[3]

> That title 28 of the United States Code, entitled "Judicial Code and Judiciary" is hereby revised, codified, and enacted into

[2] See *United States* v. *National City Lines, Inc.*, 334 U. S. 573, 582.

[3] Section 38 of the Act provides that its provisions shall take effect on September 1, 1948.

law, and may be cited as "Title 28, United States Code, section —", as follows:

* * * * *

§ 1404. Change of venue

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

(c) A district court may order any civil action to be tried at any place within the division in which it is pending.

* * * * *

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions agreeable to the usages and principles of law.[1]

[1] The Reviser's Notes state that this Section is expressive of the construction placed upon Section 262 of the Judicial

STATEMENT

The United States instituted this action on April 10, 1947, when it filed a civil suit in the Southern District of California charging the respondents with violating Sections 1 and 2 of the Sherman Act.[5] Respondents' motions to dismiss the action upon the ground that the Southern District of California is not a convenient forum for the trial were sustained by the district court, and a judgment dismissing the complaint, without prejudice to institution of a similar proceeding against the same respondents in a more appropriate and convenient forum, was entered on October 15, 1947. On appeal to this Court, the judgment of dismissal was reversed. The Court held that Congress, when it enacted Section 12 of the Clayton Act in order to enlarge the venue of proceedings under the antitrust laws, intended that the venue selected by the plaintiff should be free from attack upon the basis of the *forum non conveniens* doctrine,

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Code (28 U. S. C. 377) by this Court in *U. S. Alkali Export Assn., Inc.* v. *United States*, 325 U. S. 196, and *DeBeers Consolidated Mines, Ltd.* v. *United States*, 325 U. S. 212 (H. Rep. No. 308, 80th Cong., 1st Sess., p. A145).

[5] The present respondents include all of the respondents in *United States* v. *National City Lines*, 334 U. S. 573, except American City Lines, Inc. That respondent was merged with respondent National City Lines, Inc., on July 15, 1946, and the district court by the judgment which it signed on October 27, 1948, dismissed the cause as to American City Lines, Inc. (see *infra*, p. 44).

and that the district court was therefore without power to dismiss the action upon this ground. *United States v. National City Lines, Inc.*, 334 U. S. 573.

After the district court had received the mandate of this Court, the various respondents on August 5, 1948, filed notices that they would move the court on September 20, 1948, pursuant to their respectively annexed motions, to transfer the action to the United States District Court for the Northern District of Illinois, Eastern Division. All of these motions were based upon Section 1404 (a) of Title 28 of the United States Code and, in substance, are the same. The motion made by National City Lines, Inc., American City Lines, Inc., and Pacific City Lines, Inc., which is representative of all the others, is set forth in Exhibit A of the Appendix to this petition (*infra*, pp. 19–20).

The district court, after having heard argument on the motions to transfer, rendered an opinion on October 12, 1948, holding that Section 1404 (a) of Title 28 of the United States Code applies to the present action. The court believed that not only did the language of the section make it applicable to all civil actions, including those under the antitrust laws, but that the general purposes and structure of Public Law 773, 80th Cong., 2d Sess., and its legislative history support the view that Section 1404 (a) applies, without exception, to every civil action

brought in a federal district court. The court, having determined that the section vested it with power to transfer the present action, held that the facts of the particular case were such as to call for exercise of this power. The full text of the court's opinion is set forth in Exhibit B of the Appendix to this petition (*infra*, pp. 20–43).

On October 27, 1948, the district court filed findings of fact[*] and a conclusion of law which reads: "The convenience of the parties and witnesses and the interest of justice require that this suit be transferred to the United States District Court for the Northern District of Illinois, Eastern Division." It signed on the same day a judgment and order, which the clerk entered on October 28, 1948, transferring the cause to the United States District Court for the Northern District of Illinois, Eastern Division.[†] By an order signed on November 1, 1948, execution of the judgment and order of transfer was stayed until December 2, 1948. By a further order signed on November 29, 1948, this stay was extended until December 13, 1948, and, if a motion for leave to file petition for writ of

[*] Since the only question of which review is sought is the district court's *power* to transfer the present action, and since the district court's findings of fact are relevant only to the propriety of *exercise* of such power, assuming that it exists, the Government has not included the court's findings of fact in the Appendix to its petition.

[†] The judgment is set forth in Exhibit C of the Appendix to the petition (*infra*, p. 44).

certiorari should have been filed with this Court by December 13, 1948, until 20 days after this Court should have taken final action on said motion and petition.[8]

REASONS FOR GRANTING THE WRIT

I

The question presented for review—whether Section 1404 (a) struck down the right, conferred by Section 12 of the Clayton Act, that civil proceedings under the antitrust laws shall be tried in the district selected by the plaintiff—affects all future, as well as pending, proceedings of this character, whether the plaintiff be the United States, a private party, or a state or municipality.[9]

The question whether Section 1404 (a) effects such a change in the law is of large public importance both because of the numerous proceedings in which the issue is likely to arise and because interjection of this issue would materially frustrate "Congress' declared policy of expediting this type of litigation."[10] Aside from these

[8] The stay order of November 29, 1948, is set forth in Exhibit D of the Appendix to this petition (*infra*, pp. 45–46).

[9] Of the 87 pending civil suits brought by the United States under the antitrust laws, the issue will probably not arise in the 46 which have been tried, or in which trial has started or a definite trial date has been fixed.

[10] *United States v. National City Lines, Inc.*, 334 U. S. 573, 589. See also *idem*, pp. 590–591. In addition to the statutory provisions cited in Note 36 of the Court's opinion (pp. 589–590), Section 4 of the Sherman Act, 15 U. S. C. 4, pro-

considerations which make it of public importance that the review which is here sought be granted, the fact that the injury resulting from the alleged error of the district court cannot be redressed on appeal from final judgment is a further exceptional circumstance calling for exercise by this Court of its revisory appellate power over an inferior court which is allegedly overstepping the limits of its statutory authority.

We submit that there is no adequate remedy, apart from the writ herein sought, for the injury resulting from an unauthorized transfer of the cause to the federal court of another district. Section 2 of the Expediting Act allows appeal only from the "final" judgment of the district court and the order of transfer is an interlocutory, not a final judgment. Appeal, following entry of final judgment by the court of transfer, would not redress or correct the error committed. If final judgment should be for the plaintiff, it could not show that its rights were prejudiced by a judgment running in its favor. If judgment should be for the defendant, the only ground for attacking the judgment on the basis of the transfer would seem to be that the court of transfer lacked jurisdiction.[11] Not only would the relief

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vides that the district courts shall hear and determine the Government's civil suits under that Act "as soon as may be."

[11] If the court of transfer had jurisdiction, error in making the transfer would not appear to be, after actual trial, prejudicial error.

obtained if such attack were successful—retrial of the cause *ab initio* in the district in which suit had started—be of dubious value to the plaintiff, but it is not at all certain that the plaintiff could show, at that stage of the proceedings, lack of jurisdiction in the court of transfer. The cause of action would be within the jurisdiction of the court. It would have jurisdiction of the defendants by their express consent, and the plaintiff, having, after transfer, prosecuted its cause in the court of transfer, might be deemed to have submitted to the jurisdiction of that court.

Whether Section 1404 (a) overturned, as to a most important type of civil litigation, the statutory policy which had prevailed for 34 years presents an issue which, we submit, is of greater public importance than the questions presented in two recent cases in which this Court issued the common law writ of certiorari to review interlocutory orders entered in civil proceedings under the Sherman Act.

In *United States Alkali Export Assn., Inc. v. United States*, 325 U. S. 196, the issue which was reviewed was whether the United States was authorized to bring a civil proceeding against alleged violations of the Sherman Act by export associations, prior to proceedings by the Federal Trade Commission, as authorized by Section 2 of the Webb-Pomerene Act, with respect to the alleged violations. While the error asserted in that case and in the present one is that the action

of the district court frustrates the policy of Congress respecting the jurisdiction of federal district courts, in the one case by an unauthorized assumption of jurisdiction and in the other by an unauthorized refusal to entertain jurisdiction, the greater public gravity of the issue here lies in the fact that it concerns, not a jurisdictional question arising for the first time under statutory provisions which had been in effect 27 years, but one presented and decided within less than two months of the effective date of the new statute and expected to arise in numerous other cases. The similar question of the application of Section 1404 (a) to suits under the Federal Employers' Liability Act has already resulted in decisions in at least nine cases.[12]

In *DeBeers Consolidated Mines, Ltd.* v. *United States*, 325 U. S. 212, the question reviewed was whether the district court had exceeded its statutory authority in the relief which it had granted by the preliminary injunction which it had issued.

[12] *Hayes* v. *Chicago, Rock Island & Pacific R. R. Co.* (D. C. Minn.) and four companion cases, decided September 25, 1948 (see Note 46 of the district court's opinion in present case, *infra*, p. 43); *Pascarella* v. *N. Y. Central R. R. Co.* (E. D. N. Y.), decided November 19, 1948; *Nunn* v. *C., M., St. P. & P. R. R. Co.* (S. D. N. Y.), decided November 9, 1948; *Kilpatrick* v. *Texas & Pacific Ry. Co.* (S. D. N. Y.), decided November 12, 1948 (motion for leave to file petition pending in this Court, No. 233 Misc.); *Collett* v. *Louisville & Nashville R. R. Co.* (E. D. Ill.), decided October 18, 1948 (motion for leave to file petition pending in this Court, No. 206 Misc.).

There, as here, the injury caused by the district court's interlocutory order could not be redressed by any final judgment which might be entered. But the public importance of the issue presented here is incomparably greater than that passed upon in the *DeBeers* case. The former concerns enforcement by the United States of a statute regulatory of the nation's trade and commerce and the issue is one which, until settled by this Court, will constantly plague litigants and district courts. The alleged error in the *DeBeers* case, on the other hand, affected only a small number of affiliated foreign corporations and would seldom, if ever, occur again.

II

We urge, as a further reason for allowance of writ of certiorari, that the district court's interpretation of Section 1404 (a) is erroneous.

Congress has long had the policy of establishing special venue and jurisdictional provisions for civil suits under the antitrust laws. As to suits brought by the United States, Section 5 of the Sherman Act (15 U. S. C. 5) provides that the court may summon before it parties defendant not resident in the district of suit. Section 7 of the Act (later superseded by Section 4 of the Clayton Act, 15 U. S. C. 15), which authorized triple damage suits by private parties injured by violation of the Act, fixed the venue of such suits.

By sections 4 and 12 of the Clayton Act, Congress further liberalized the venue of suits under the antitrust laws, and provided that the considerable range in choice thereby given to the plaintiff as to the district in which to prosecute his action, included the right to trial of the cause in the district in which suit had been instituted. *United States* v. *National City Lines, Inc.*, 334 U. S. 573.

The question sought to be reviewed is whether statutory provisions, framed in general terms broad enough to embrace every civil action in a federal district court, repealed by implication the foregoing right to trial in the district of the plaintiff's choice, conferred by special legislation dealing with a particular type of proceeding. Certainly there was no such implied repeal if effect is given to the general rule that "where there are two statutes upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal, or an absolute incompatability, that the special is intended to remain in force as an exception to the general" (*Washington* v. *Miller*, 235 U. S. 422, 428, and cases cited).

There is clear indication, irrespective of this rule of construction, that Congress never intended such implied repeal. Public Law 773, 80th Cong., 2d Sess. is entitled "An Act to revise, codify, and enact into law" Title 28 of the United States Code. The major purposes of the Act were to

make the provisions of this title the law rather than merely presumptive evidence of the law, to arrange these provisions in a logical order, to remove existing inconsistencies and ambiguities in them, and to eliminate those which had been impliedly repealed or had become obsolete.[12] Since the venue provisions of the Clayton Act have never been included in Title 28 of the United States Code and have not been codified by Public Law 773 (see Chapter 87), they are not within the Act's scope and are to be deemed not affected by its provisions.

Public Law 773 is legislation of a highly technical character and its drafting was delegated to a staff of editors of two law publishing firms.[14] It sponsors and draftsmen repeatedly stated that the purpose was to avoid making any changes in substantive law of a controversial nature.[15] The House Report on the bill states that "minor changes were made in the provisions regulating the venue of district courts in order to clarify ambiguities or to reconcile conflicts" (H. Rep. No. 308, 80th Cong., 1st Sess., p. 6). The Senate

[12] S. Rep. No. 1559, 80th Cong., 2d Sess., pp. 1–2.

[13] H. Rep. No. 308, 80th Cong., 1st Sess., pp. 2–3.

[14] Hearings before Subcommittee No. 1 of House Judiciary Committee on H. R. 1600 and H. R. 2055, 80th Cong., 1st Sess., pp. 6, 11 (Congressman Keogh), 19 (Circuit Judge Maris), 24 (Barron, chief reviser), 32 (Circuit Judge Sanborn); 94 Cong. Rec. 8109 (Sen. Donnell, spokesman for Senate Judiciary Committee); S. Rep. No. 1559, 80th Cong., 2d Sess., p. 2.

Report emphasized that only noncontroversial changes were intended to be made in the law: "Many noncontroversial improvements have been effected which, while individually small in themselves, add up to a very substantial improvement in and modernization of the law relating to the Federal judiciary. At the same time great care has been exercised to make no changes in the existing law which would not meet with substantially unanimous approval." (S. Rep. No. 1559, 80th Cong., 2d sess., p. 2.)

Congress clearly entertained the view that the proposed legislation would make no substantial or controversial change in the law. The bill which became Public Law 773 was presented to both the Senate and the House via the consent calendar, rules were suspended, and the bill passed practically without debate (except for certain provisions relating to the United States Tax Court which were eliminated before passage).[16] There was no debate on Section 1404 (a). No reference was made to Section 12 of the Clayton Act in the Committee reports on the bill, in the House hearings on the bill or in the reviser's notes.

The district court believed that the reviser's notes to Section 1404 (a)[17] supported its interpretation of the section. If the note should be

[16] 93 Cong. Rec. 8550–8559; 94 Cong. Rec. 8108–8111, 8675–8678.

[17] H. Rep. No. 308, 80th Cong., 1st Sess., p. A132.

read as showing that the reviser intended that Section 1404 (a) should apply to suits under the Federal Employers' Liability Act, the obviously controversial change which would then be made in the law is so inconsistent with the scope and declared purposes of the legislation that the reviser's note may not properly, in this instance, be accepted as declaratory of congressional intent. Even if the note should be regarded as sufficient to override, with respect to the Federal Employers' Liability Act, all countervailing considerations, such effect is not to be extended to suits under the antitrust laws. The statutes in question are not related, and an intent to change the effect of the venue provisions of one of them does not necessarily show a like intent as to the other.

In summary, the Government's position is: Public Law 773 was intended to effect only minor and noncontroversial changes in the law. Section 1404 (a) was, we submit, intended to have the valuable but noncontroversial effect of giving to the district courts, in cases where the doctrine of *forum non conveniens* was previously applicable, power to transfer the action to another district, in substitution for the more drastic remedy of dismissing the action upon the ground of the inconvenience of the forum. A holding that Section 1404 (a) applies to suits under the antitrust laws requires the assumption that Congress had, *sub silentio,* made a substantial and controversial change in the rights conferred by

Section 12 of the Clayton Act, as that Section had been interpreted "without qualification" during the 34 years of its life (334 U. S. 573, 578). Nowhere in the legislative history of the Act is there the slightest indication that Congress so intended. The reviser's note to the section cannot be said to reflect the "deviation" from "established practice" represented by the ruling made by the district court in the present case on September 29, 1947. That decision was rendered more than six months after the submission of the reviser's notes to Congress on April 25, 1947 (H. Rep. 308, 80th Cong., 1st sess.). This Court's decision, upholding the inapplicability of *forum non conveniens* in antitrust cases, was delivered June 7, 1948. (334 U. S. 573.) The bill containing the new Judicial Code was passed by the Senate on June 12, 1948, and by the House on June 16, 1948. (Pub. Law 773.) We think it clear that Congress would not have intended to repudiate an important principle under the antitrust laws so recently affirmed by this Court without adverting in some way to either the principle or this Court's decision.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for writ of certiorari should be granted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

DECEMBER 1948.

APPENDIX

EXHIBIT A

Motion to Transfer filed on August 5, 1948, by National City Lines, Inc., American City Lines, Inc., and Pacific City Lines, Inc.

Said defendants move that the above entitled action be transferred to the District Court of the United States for the Northern District of Illinois, Eastern Division, upon the ground that such transfer is necessary for the convenience of parties and witnesses and is in the interest of justice. Said motion will be based upon Section 1404 (a) of Title 28 of the United States Code; upon the files and records of the above entitled action and particularly upon the affidavits of the following persons, filed on the dates set forth immediately after their names:

E. Roy Fitzgerald, August 11, 1947;
C. Frank Reavis, August 11, 1947;
C. Frank Reavis, September 11, 1947;
C. Frank Reavis, September 15, 1947;
Jackson W. Chance, August 28, 1947;
H. H. Hollinger, September 11, 1947;
Joseph Thomas, September 11, 1947;

the affidavit of E. Roy Fitzgerald filed concurrently herewith; upon the Findings of Fact made and filed by the Court in the above entitled action on October 15, 1947; upon the opinion of the above entitled Court filed herein on Septem-

ber 29, 1947 (7 F. R. D. 456); upon the opinion of the above entitled Court filed August 14, 1947, in *United States of America* vs. *National City Lines, Inc., et al.*, Criminal Action No. 19270 CR (7 F. R. D. 393), and upon the accompanying memorandum of points and authorities.

EXHIBIT B

Opinion by District Judge Leon R. Yankwich
Filed October 12, 1948

I

THE MOTION TO TRANSFER

This civil action seeking injunctive and other relief against the defendants for violation of the Sherman Anti Trust Act[1] was instituted on April 10, 1947. On September 29, 1947, I granted the motion of the defendants to dismiss the action on the ground that our district was an inappropriate forum for its maintenance and prosecution.[2] On direct appeal to the Supreme Court, pursuant to the special provision of the Judicial Code,[3] that Court reversed the order upon the ground that the doctrine of *forum non conveniens* does not apply to civil actions of this character, in which the choice of venue is determined by Section 12 of the Clayton Act.[5]

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[1] 15 U. S. C. A., Sec. 4.

[2] *United States* v. *National City Lines, Inc.*, 1947, D. C. Calif., 7 F. R. D. 456.

[3] 15 U. S. C. A., Sec. 29.

[4] *United States* v. *National City Lines*, 1947, D. C. Calif., 7 F. R. D. 393.

[5] 15 U. S. C. A., Sec. 22.

After the return of the mandate to this Court, the defendants moved to transfer the cause to the district court for the Northern District of Illinois, Eastern Division, the district to which a companion criminal prosecution against nine corporate defendants involved in this action and seven individuals, originally instituted in this district, was transferred by me on August 14, 1947.[6] The transfer was made under the provision for change of venue contained in the Federal Rules of Criminal Procedure.[7]

The motion to transfer the present proceeding is made under a new section of the revised Judicial Code, which went into effect September 1, 1948.[8]

The Government resists the motion and has filed a countermotion to strike the motion to transfer.

II

CHANGE OF VENUE

In the main, the position of the parties to this litigation is the same as to both motions. For, in the last analysis, it relates to the applicability or non-applicability of the new provision for the transfer of civil actions to other districts to an action of this character, which reads:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer *any civil action* to any

[6] *United States* v. *National City Lines*, 1947, D. C. Calif., 7 F. R. D. 393.

[7] Rule 21 (b), Federal Rules of Criminal Procedure, 28 U. S. C. A. foll. Sec. 732 (c).

[8] 28 U. S. C., Sec. 1404 (a).

other district or division where it might have been brought.[9] [Emphasis added.]

The clause is part of a section which the Revisers have entitled, "Change of Venue", and which also allows the transfer of civil actions from one division to another,[10] and the trial of any civil action at any place within the Division.[11]

A consideration of this enactment calls for certain general and almost obvious observations.

We are not dealing with an *amendatory* statute, but with a revision of the entire Judicial Code, the first one attempted since 1911. This aim was set forth with thorough emphasis in the Reports of the Senate and House Judiciary Committees. The Senate Committee on the Judiciary, in its Report to accompany H. R. 3214, stated:

> It is evident, therefore, that *a thorough codification and revision of the statutes* relating to the judiciary and *its procedure* is very much in the public interest in order that the law in this important field may be *clear, certain and readily available.*
>
> The bill H. R. 3214 accomplishes these desirable results. The statutory material presently in force has been arranged in the bill *in a logical and consistent way*, rendering it easily ascertainable. *Existing inconsistencies and ambiguities have been removed and obsolete and archaic provisions eliminated or modernized.*
>
> By enacting this bill into positive law as title 28 of the United States Code, *that title will thereby become the law rather than merely presumptive evidence of the law,*

[9] 28 U. S. C., Sec. 1404 (a).
[10] 28 U. S. C., Sec. 1404 (b).
[11] 28 U. S. C., Sec. 1404 (c).

and reference to prior volumes of the Statutes at Large will be rendered wholly unnecessary.[12] [Emphasis added.]

The Report of the House Committee on the Judiciary, dated April 25, 1947, which accompanied the Resolution, stressed the object of the resolution *"to revise, codify and enact into law"*.[13] It called attention to the changes in the national scene which "make imperative this *revision* of the Judicial Code."[14] [Emphasis added.]

Professor James Wm. Moore, who was one of the consultants on the revision, stated, on March 7, 1947, at the hearing before Subcommittee No. 1 of the House Judiciary Committee:

> *The revision is a statement of the law and not merely presumptive. If enacted, the revision will state the law on matters covered by it.*[15] [Emphasis added.]

He added:

> Now, however, in attempting a revision of what is essentially only one title of the United States Code, it seems proper to state *what the law is and not make the revision merely presumptive of the law. The Federal judiciary, practitioners, and other interested parties, are entitled to that much certainty.*[16] [Emphasis added.]

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[12] 28 U. S. C. Congressional Service, p. 1675–1676. (Senate Report No. 1559, 80th Congress, Second Session.)

[13] 28 U. S. C. Congressional Service, p. 1692. (House Report No. 301, 80th Congress, First Session.)

[14] 28 U. S. C. Congressional Service, p. 1693. (House Report No. 301, 80th Congress, First Session.)

[15] 28 U. S. C. Congressional Service, p. 1967.

[16] 28 U. S. C. Congressional Service, p. 1968.

These facts are important. For, in attempting to discern the purpose of the enactment, we are, at the outset, confronted with the proposition that it created a *new procedural* scheme, namely, a method of transferring cases from one district to another, which did not exist before. This was accomplished not by amending existing law, but by including the particular provision in a single piece of legislation, the object of which was to enact a revised code dealing with the jurisdiction of, and procedure in, the courts of the United States.

In endeavoring to achieve this object, the Congress strove to attain uniformity and simplicity of expression. The various circumlocutions, which had heretofore been used to designate the varieties of actions, were abandoned and the phrase "civil action" was substituted. The reviser's notes, which the Committees made a part of their report to the two Houses of the Congress, reveal this intention. Indeed, this appears in the very section on change of venue.[17] The phrase "any civil action" is given as the equivalent of "any action, suit or proceeding of a civil nature" used in subdivision (b).[18] And the reviser's notes leave no

[17] 28 U. S. C., Sec. 1404 (a) (c).

[18] 28 U. S. C., Sec. 1404 (b). The following sections, among others, and the reviser's notes to them show intent to use the phrase *to cover civil cases of whatever nature*, in conformity with and maritime cases); 1335 (interpleader); 1336 (interstate commerce commissions orders); 1337 (commerce and anti-trust regulations); 1338 (patents, copyright, trademark, unfair competition); 1339 (procedural matters); 1340 (internal revenue and customs duties); 1343 (civil rights); 1344 (election disputes); 1346 (United States as defendant); 1347 (partition where United States is tenant); 1348 (bank associ-

doubt that this was their intention in the entire revision.[19]

III

THE MANNER OF CHANGING VENUE

The aim of the Congress in enacting the section allowing transfers from one district to another, and from one division to another, was to cover the entire field and set down the circumstances under which such transfers could be had, either by the consent of the parties, or upon a proper showing.

Professor Moore, in his statement before the Subcommittee of the House Judiciary Committee, made this very plain. He said:

> *Venue provisions have not been altered by the revision. Two changes of importance have, however, been made. Improper venue is no longer grounds for dismissal of an action in the Federal courts. Instead, the district court is to transfer the case to the proper venue.* See Section 1406. *And Section 1404 introduces an element of convenience which gives the court the power to transfer a case for the convenience of parties and witnesses to another district. Both of these changes were in line with modern State practice; and the provision for change of venue on the grounds of convenience is also embodied in the Bank-*

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ation as party); 1349 (federal corporation as party); 1350 (alien's action for tort); 1351 (actions against consuls); 1353 (actions on Indian allotments).

[19] By way of illustration, we append the reviser's notes to three of the sections referred to in the preceding Note:

"Section 1336—Section Revised:

"Based on title 28, U. S. C., 1940 ed. ##41 (27), (28) (Mar. 3, 1911, ch. 231, ##24 (27), (38), 207, 36 Stat. 1091, 1148;

> *ruptcy Act for corporate reorganization, section 118, Eleventh United States Code, Section 518.*[20] [Emphasis added.]

The reviser's notes to the section state:

> Subsection (a) was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, *even though the venue is proper.* As an example of the need of such a provision, see *Baltimore & Ohio R. Co. v. Kepner,* 1941; 62 S. Ct. 6, 314 U. S. 44, 86 L. Ed. 28, *which was prosecuted under the Federal Employer's Liability Act in*

Oct. 22, 1913, ch. 32, 38 Stat. 219). Words 'Except as otherwise provided by enactment of Congress' were inserted because of certain similar cases of which the courts of appeal are given jurisdiction. (See, for example, section 21 of title 15, U. S. C., 1940 ed., Commerce and Trade).

"Words 'any civil action' were substituted for 'all cases' and 'cases' in view of rule 2 of the Federal Rules of Civil Procedure.

"Changes were made in phraseology."

"Section 1337—Section Revised:

"Based on title 28, U. S. C., 1940 ed., #41 (8), (23) (Mar. 3, 1911, ch. 231, #24, pars. 8, 23, 36 Stat. 1092, 1093; Oct. 22, 1913, ch. 32, 38 Stat. 219). Words 'civil action' were substituted for 'suits' in view of rule 2 of the Federal Rules of Civil Procedure. Changes were made in phraseology."

"Section 1338—Section Revised:

"Based on title 28, U. S. C., 1940 ed., ##41 (7) and 371 (5) (Mar. 3, 1911, ch. 231, ##24, par. 7, 256, par. 5, 36 Stat. 1092, 1160)."

"Section consolidates section 41 (7) with section 371 (5) of title 28, U. S. C., 1940 ed., with necessary changes in phraseology. Words 'of any civil action' were substituted for 'all suits at law or in equity' and 'cases' to conform section to rule 2 of the Federal Rules of Civil Procedure" (28 U. S. C. Congressional Service, p. 1838).

[20] 28 U. S. C. Congressional Service, p. 1969.

New York, although the accident occurred and the employee resided in Ohio. The new subsection *requires* the court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so."[21] [Emphasis added.]

It is, therefore, evident that the aim of the Congress was (1) to establish, through this revision a single procedural scheme to cover all incidences of procedure in the federal courts not provided for by the Rules of Civil Procedure; and (2) to apply the provisions, *except where otherwise indicated, to all civil actions,* of whatever nature.

The aim being procedural, it is axiomatic that, unless the contrary appears, the provisions are applicable to pending proceedings.[22]

The principle which forbids application of new enactments or revisions to pending actions applies to statutes dealing with substantive rights only.[23]

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[21] 28 U. S. C. Congressional Service, p. 1853.

[22] 50 Am. Jur., Statutes, Sec. 482; *Campbell* v. *Holt*, 1885, 115 U. S. 620; *Wm. Danzer Co.* v. *Gulf R. R.*, 1925, 268 U. S. 633; *Graham & Foster* v. *Goodcell*, 1931, 282 U. S. 409, 418; *Funkhouser* v. *J. B. Preston Co.*, 1933, 290 U. S. 163, 167; *In re Monser*, 1935, 7 Cir., 74 F (2) 411; *United States* v. *Standard Oil Co.*, 1937, D. C. Calif., 21 Fed. Sup. 645, 660; *Connell* v. *City of Jerseyville*, 1938, 7 Cir., 96 F (2) 392, 400; *Bowles* v. *Strickland*, 1945, 7 Cir., 151 F. (2d) 419.

[23] 50 Am. Jur., Statutes, Secs. 476, 477; *United States* v. *Heth*, 1806, 3 Cranch, 398, 413; *Railroad Co.* v. *Grant*, 1878, 98 U. S. 398; *White* v. *United States*, 1903, 191 U. S. 545; *Winfree* v. *Northern Pacific Ry.*, 1913, 227 U. S. 296; *Shwab* v. *Doyle*, 1922, 258 U. S. 529, 535; *United States* v. *Magnolia Petroleum Co.*, 1928, 276 U. S. 160, 163; *Hassett* v. *Welch*, 1938, 303 U. S. 303, 314; *Claridge Apts.* v. *Commis-*

At times, it is difficult to draw a distinct line between substantive law and procedure. And many procedural changes have, historically, had a lasting effect on substantive rights, as, for instance, the rule allowing the jury to judge both the law and the facts in criminal libel.[24] Nonetheless, matters of venue and change of venue are, as a rule, mere incidences of procedure. And statutes relating to remedies and procedure operate retrospectively.[25]

IV

CHANGE OF VENUE IN ANTITRUST CASES

These premised, we come to the nub of the controversy, which is:

Does the provision for transfer apply to the present action?

I am of the view that it applies to *all* pending civil cases, as readily appears from the legislative history and the legal principles just considered. And it applies to antitrust cases unless we can find in the decision of the Supreme Court in the present case language indicating that the special venue statute in antitrust cases,[26] as the Supreme Court construes it, immunizes such actions against a general transfer enactment of the type under consideration, as the Court has held it protects it from the impact of the doctrine of *forum non conveniens*.

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sioner, 1944, 323 U. S. 141, 164; *Commissioner* v. *Commodore*, 1943, 6 Cir., 135 F. (2d) 89, 91–92.

[24] Yankwich, Essays in the Law of Libel, 1929, pp. 267–272.

[25] See cases cited in Note 22. And see, *Richard* v. *National City Bank*, 1934, D. C. N. Y., 6 Fed. Sup. 156; *Benas* v. *Maher*, 1942, 8 Cir., 128 F. (2d) 247, 251.

[26] 15 U. S. C. A., Sec. 29.

So it becomes imperative to analyze the language of the Court in its proper setting. The gist of the majority opinion is contained in the statement of Mr. Justice Rutledge:

> When, therefore, Congress came to face the problem of making the nation's antitrust policy more effective through the Clayton Act's provisions, that body was not confronted with any problem of abuse by plaintiffs in selecting venue for antitrust suits; nor was it concerned with any question of providing means by which the defendants in such suits might defeat the plaintiff's choice to serve their own convenience. *Congress' concern was quite the opposite. It was to provide broader and more effective relief, both substantively and procedurally, for persons injured by violations of its antitrust policy.* Insofar as convenience in bringing suit and conducting trial was involved, *the purpose was to make these less inconvenient for plaintiffs or, as was said in the Eastman opinion, to remove the "often insuperable obstacle" thrown in their way by the existing venue restrictions.*
>
> To have broadened the choice of venue for the reasons which brought about that action, only to have it narrowed again by application of the vague and discretionary power comprehended by *forum non conveniens* would have been incongruous, to say the least. In making the change Congress did not authorize plaintiffs to institute civil antitrust suits in the newly specified districts, merely in order to have them transferred back for trial to one of the districts comprehended by #7. *It intended trial to take place in the district*

specified by the statute and selected by the plaintiff.[27] [Emphasis added.]

The Government sees in the last italicized sentence a declaration that the institution of the action, and the consequent right to choose venue, imply the *absolute right of trial* in the place chosen.

We need not consider the contention of the defendants that the legislative history *does not* support the Court's interpretation. We cannot make our own gloss in a matter in which the Supreme Court has spoken so recently. We must give to the language used its full implication. So doing, however, we must bear in mind the theoretical basis of the opinion.

It was the Government's contention before the high court, *as it was before me,* that the doctrine of *forum non conveniens does not apply to actions instituted under special venue statutes.* Mr. Justice Jackson, who wrote the majority opinion in the Gulf[28] and Koster[29] cases, adopted this view as flowing from those decisions. In his concurring opinion in this case, in commenting on those cases, he says:

> We have just had occasion to review and to decide by a divided Court, cases involving the doctrine of forum non conveniens. *Gulf Oil Corp* v. *Gilbert,* 330 U. S. 501; *Koster* v. *Lumbermen's Mutual Casualty Co.,* 330 U. S. 518. We there held that, in cases where the plaintiff was in court in an ordinary civil suit only by reason of the

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[27] *United States* v. *National City Lines, Inc.,* 1948, 334 U. S. 573, 581.

[28] *Gulf Oil Co.* v. *Gilbert,* 1947, 330 U. S. 501.

[29] *Koster* v. *Lumbermen's Mutual Co.,* 1947, 330 U. S. 518.

venue statutes that apply generally, the jurisdiction if the circumstances of the court could exercise discretion in dismissing complaints to prevent imposition on its particular case showed an abuse of the option vested in plaintiff by the general venue statutes. *But we also pointed out that, where the choice of forum was authorized by a special venue statute, this discretion to dismiss* would not be implied. The distinctions there made between general and special venue statutes may have been overly simple from the viewpoint of the dialectician. *But as working tools of everyday craftsmen they do serve to point out a difference that I think governs here.*[2]

Under this view of the law, the doctrine of *forum non conveniens* would apply only to cases arising under *general venue statutes.* It would not apply to those brought under *special venue statutes,* such as the Federal Employers' Liability and the Anti Trust statutes. But the majority opinion *did not so hold.* It did not choose to establish a principle to serve as a guide in all cases. It preferred to hold merely that *the history of anti trust legislation shows an intent not to limit the choice of forum by the application of the doctrine of forum non conveniens.* And it interpreted its prior decisions as applying the same principle to the *Federal Employers' Liability* statute, in the light of its particular history. So the language of the majority opinion, when read in this perspective, means simply that, because of the legislative history of anti trust laws, the court declined to allow the application to them

[2] *United States* v. *National City Lines, Inc.*, 1948, 334 U. S. 581.

of the doctrine of *forum non conveniens*. So, any implication of absolute choice of place of trial in anti trust cases must be read in that light. They stand proof against interference by the application of the doctrine of *forum non conveniens*. But are they impregnable to the legislative power of the Congress which granted the choice of forum in the first instance? I think not. The legislative history of the revision of the Judicial Code shows that the intent of the Congress was to overcome the absolute choice in cases of this character, in which the court's interpretation had resulted. And the "legislative intent" they sought to overcome was *their own* as found by the Court. The reviser's Notes and Professor Moore's statements, already referred to,[31] make this quite plain. The

[31] See Notes 18, 19, 20, 21. In a recent address, Mr. Justice Jackson pointed out some of the difficulties inhering in any attempt to determine the meaning of a statute by legislative history. He said:

"I am coming to think it is a badly overdone practice, of dubious help to true interpretation and one which poses practical problems for a large part of the legal profession. The British courts, with their long accumulation of experience, consider Parliamentary proceedings too treacherous a ground for interpretation of statutes and refuse to go back of an Act itself to search for unenacted meanings. They thus follow Mr. Justice Holmes' statement, made, however, before he joined the Supreme Court, that 'We do not inquire what the legislature meant, we ask only what the statute means.' And, after all, *should a statute mean to a court what was in the minds but not put into the words of men behind it, or should it mean what its language reasonably conveys to those who are expected to obey it?*" (Jackson, Problems of Statutory Interpretation, 1948, 8 F. R. D., 121, 124.) [Emphasis added.]

The answer to the alternative is that given by the Supreme Court in an opinion in which Mr. Justice Holmes concurred:

reference is only to the Kepner case.[32] Obviously, because the notes antedate the decision in the

"Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion." (*Caminetti* v. *United States*, 1917, 212 U. S. 470, 485). (And see, *United States* v. *American Trucking Assn.*, 1940, 310 U. S. 534, 543. Divergent views on the function of courts in such cases are expressed by Max Radin, 1929, Statutory Interpretation, 43 Harvard Law Rev. 863, 881–883, which comments on the Caminetti case in Note 38, and James M. Landis, 1929, A Note on "Statutory Interpretation," 43 Harvard Law Review, 886, 889–893).

And when, as here, the language is explicit, resort to legislative history merely serves to show that the statute actually "means" what the legislature "meant." Differently put, legislative history simply corroborates the obvious meaning of the language used in the law. (See, *Taub* v. *Bowles*, 1945, U. S. Em. App., 149 F. (2d) 817, 819–821.) To read exceptions into such language is to disregard the evident. This we cannot do, especially when we are dealing, not with an amending act, but with an entire code revision. (See, *United States* v. *Nischo*, 1923, 262 U. S. 165, 168–169; *United States* v. *Flores*, 1933, 289 U. S. 137, 148–151; 50 Am. Jur., Statutes, Secs. 446, 454.) Under such circumstances, the doctrine of implied repeal need not concern us. More, as the discussion shows, the interpretation which we have adopted is not *inconsistent* with the right to choose venue. It merely subjects the choice to judicial qualification under definite conditions. The two provisions do not conflict. To the contrary, they supplement and complement each other.

The new provision does away with the right to dismiss for "improper venue." (See Statement of Professor Moore, quoted in Part III of the opinion.) The doctrine of *Forum non conveniens*, which allowed such dismissal if the forum be found inconvenient, disappears, and the right of transfer is substituted for it. We have clearly a complete and logical new scheme covering the entire field.

[32] *Baltimore & Ohio R. Co.* v. *Kepner*, 1941, 314 U. S. 44.

present case. They were placed before the Congress in March and April, 1948. The date of the decision was June 7, 1948. And the new Title 28 was approved on June 24, 1948.

One other observation. It is a fundamental rule of statutory interpretation that a statute general in its language is to be given general application.[33] No exceptions will be read into a statute of such character. The legislative history of the revision of this portion of the Judicial Code evidences an intention to follow the accepted pattern in this respect. This also appears from the

[33] 50 Am. Jur., Statutes, Secs. 432, 433.

"The court cannot add an exception on equitable grounds when Congress forbore to make such an exception." (*Louisville & Nashville R. R.* v. *Motley*, 1911, 219 U. S. 467, 479. And see, *Addison* v. *Holly Hill Fruit Products, Inc.*, 1944, 322 U. S. 607, 611; *United States* v. *Wishnatzki*, 1935, 2 Cir. 77 F. (2) 357, 358–359). Behind these rulings is the thought that when the words used in a statute are general, it is judicial usurpation not to give them the inclusiveness which their meaning denotes. So, in the Addison case just referred to, the Court refused to dilute the word "all" to "*substantially all.*" The Circuit Court of Appeals for the 2nd Circuit, speaking through Judge Frank, has expressed the same idea in this trenchant fashion:

"The familiar 'easy-to-say-so-if-that-is-what-was-meant' rule of statutory interpretation has full force here. The silence of Congress is strident. Judicial legislation is one of the facts of life, an inescapable and necessary one. But courts may not, as legislatures may, roam at large, confined only by the Constitution; their function, when dealing with legislative legislation, does not go beyond that of filling in small gaps left by the legislature—and to closing those gaps in accordance with what appears to have been the legislative purpose." (*Commissioner of Internal Revenue* v. *Beck's Estate*, 1942, 2 Cir., 129 F. (2) 243, 244, 245.)

use of the adjective "any", which is defined as follows:

> 1. One indifferently out of a number; one (or, as pl., some) indiscriminately of whatever kind; specif; (a) Indicating a person, thing, event, etc., as not a particular or determinate individual of the given category but whichever one chance may select; this, that, or the other; one or another; * * * (b) Indicating a person, thing, etc., as one selected without restriction or limitation of choice, with the implication that every one is open to selection without exceptions; * * * (c) Indicating one person, thing, etc., taken with indifference to quality; one or some, however excellent or poor (more often the latter); as, any plan would be better than no plan."[34]

"Any" covers everything in a category or class. Its use excludes exceptions unless they are specifically given. For its primary meaning is "one indefinitely, or indifferently, out of a number."[35] And that the aim was to use the word in that sense is evident from the legislative history already given. This is also apparent from the fact that whenever, in this revision, the Congress intended either the whole revision or a specific provision in it, *not* to apply, they made specific exceptions from the generic phraseology. An example of this is found in Section 2680, 28 U. S. C. The revisers, after recodifying the Tort Claims Act, specifically excluded from its operation twelve distinct types of claims, which would

[34] Webster's New International Dictionary, 1937 Ed., p. 1021.

[35] 3 C. J. S., Any, p. 1399.

have been included under the general terminology of the section.

So the whole scheme of the revision stands in the way of a construction which would exempt this special type of action from any of the incidences of procedure codified. More, this interpretation is not inconsistent with the aim of the special venue provision in antitrust cases.[36] *It stands unimpaired. The Government still has the choice of venue.*

However, the court may, under conditions prescribed by the Congress and "in the interest of justice", change the venue.

On the whole, therefore, there is no legal or factual reason for not giving full effect to the intention of the revisers in making this section applicable to antitrust actions.

V

THE DISCRETIONARY POWER TO TRANSFER

There remains the question: Do the facts warrant the granting of the motion?

A *Conditions for Transfer*

Before answering this question by reference to the facts, we consider briefly the meaning of the transfer provision.

The wording of the clause is different from that of the corresponding provision in the criminal rules. The latter calls for a transfer "if the Court is satisfied that in the interest of justice, the proceeding should be transferred."[37] The

[36] 15 U. S. C. A., Sec. 22.

[37] Rule 21 (b), Federal Rules of Criminal Procedure.

section under consideration provides for transfer "for the convenience of parties and witnesses, in the interest of justice."[38] While both sections use the identical phrase "in the interest of justice" as a criterion, the civil transfer rule uses the phrase in juxtaposition with the convenience requirement. But the meaning of the phrase is the same in both instances:

> It implies conditions which assist, or are in aid of or in the furtherance of, justice. Both call for the doing of things which bring about the type of justice which results when law is correctly applied and administered. They import the exercise of discretion which considers both the interests of the defendant and those of society. When commanded by a statute, they do not attempt to determine, in advance, the type of judicial action to be taken.[39]

In the case in which the phrase just quoted occurs, I considered the convenience of parties and witnesses as one of the criteria in determining whether a transfer should be made. And in the present case, I took into account the same element in considering the application of the doctrine of *forum non conveniens*.[40] In so doing, I did not weigh the convenience of the defendants only, but that of the Government also. The conclusion was arrived at after a balancing of conveniences. This is of the very essence of the

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[38] 28 U. S. C., Sec. 1404 (a).

[39] *United States* v. *National City Lines, Inc.*, 1947, D. C. Calif., 7 F. R. D. 393, 397.

[40] *United States* v. *National City Lines, Inc.*, 1947, D. C. Calif., 7 F. R. D. 456.

judicial process in any matter which calls for the exercise of discretion. Indeed, I wrote:

> A court of equity should aim to balance societal and individual interest and to maintain the proper equilibrium between private rights and public weal.[41]

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[41] *United States* v. *National City Lines, Inc.*, 1947, D. C. Calif., 7 F. R. D. 456, 466. And see, Yankwich, Increasing Judicial Discretion in Criminal Proceedings, 1941, 1 F. R. D. 746.

The importance of proper fact-finding by judges is stressed by Judge Frank in Re Fried, 1947, 2 Cir., 161 F. (2) 453, 462:

"Mistakenly to apply a rule to non-existent facts—to facts mistakenly 'found'—is no less unjust, no less a defective operation of judicial administration, than to apply an erroneous 'substantive' legal rule to the actual facts. Either way, the policy expressed in the correct rule is frustrated. An error in 'finding' the facts thus yields what might be called 'injustice according to law.' The facts involved in any case are past facts. They do not walk into the courtroom. Judicial fact-finding, a human process by which a man or some men attempt to reconstruct a segment of an 'objective' past, is necessarily fallible. For it is a job of history-writing, and, like all history-writing, inescapably involves 'subjective' factors and encounters other obstacles sometimes insurmountable. But courts cannot shirk that job. And acknowledgment that the process can never reach perfection does not excuse us from rendering it free of all practically avoidable defects."

He treats the problem more fully in Say It With Music, 1948, LXI Harvard Law Review, 921, 949–955.

Judge Frank's approach to this problem is but a part of his preoccupation with the nature of the judicial process, and of the function of the Judge in modern society. I have dealt with this subject on numerous occasions. See Yankwich, Some of the Social Phases of the Administration of Justice, 1932, 5 S. Cal. Law Review, 189, 207; Yankwich, The Judge in Modern American Society, 1935, 40 Commercial Law Journal, pp. 171 et seq.; Yankwich, Judge in a Progressive Society, 1939, 14 L. A. Bar, Ass'n Bulletin, pp. 297

The transfer provision which concerns us here depends on discretion for its application, as do the kindred provision in the criminal cases and the doctrine of inconvenient forum.

B. *Should the Discretion be Exercised?*

Having determined that the transfer provision is applicable to this litigation, our next inquiry is whether the discretion should be exercised under the facts in the case.

The factual situation did not change while the matter was before the Supreme Court. It is the same as existed when I granted the motion to dismiss. The affidavits filed with the prior motion have been refiled and adopted for the purposes of the present motions. The Government has filed no additional affidavits. But it was agreed at the hearing that the additional facts contained in the affidavit of Jesse R. O'Malley, one of counsel for the Government, in opposition to the affidavit of Denis B. Sullivan, filed in opposition to the Government's motion for an early trial date, might be considered. The affidavit merely recites that a transfer to the Northern District of Illinois, Eastern Division, might result in delay because of the crowded condition of the calendar of that court. It points to the fact that the transfer of the criminal case had resulted in delay.

Speculations as to possible time of trial are not determinative of the matter. Regardless of the condition of their calendars, district courts have it within their power to advance cases when pub-

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et seq.; and see, Yankwich, Findings in the Light of the Recent Amendments to the Rules of Civil Procedure, 1948, 8 F. R. D. —.

lic interest so requires. And if the need for immediate action is brought home to the judges of the District Court of Illinois, I am certain that they will arrange for as early a trial of this cause as could be had in this district. In the instant case, the Government could very readily have avoided the delay which resulted from its direct appeal from my ruling by refiling the case immediately in the Northern District of Illinois, Eastern Division, especially when the defendants had stipulated that they would not seek a dismissal if so refiled.[2]

I do not question the Government's right to seek the alternative of appeal in order to avoid a decision which it disapproved and which it did not desire to become established as an unchallenged precedent. However, in balancing the conveniences, we must exclude situations such as delay brought on by the voluntary act of the Government when it had another alternative.

I need not repeat the summary of the affidavits given in the two previous opinions.[3] Having reexamined them, and having considered the additional affidavits and facts in the record to which my attention has been called by both parties, I am of the view that the convenience of the parties and witnesses require the transfer of this case in the interest of justice.

Anticipating that such conclusion might be based on a balancing of conveniences, counsel for

[2] *United States v. National City Lines*, 1947, D. C. Calif., 7 F. R. D. 456, 466.

[3] *United States v. National City Lines*, 1947, D. C., Calif., 7 F. R. D. 393; *United States v. National City Lines*, 1947, D. C. Cal., 7 F. R. D. 456.

the Government intimated at the hearing that no resort could be had to such method in resolving the conflicting contentions. I agree that when the section speaks of the convenience "of parties and witnesses," it means that the convenience of both sides must be examined. But I know of no way of applying the requirement to a particular situation than by viewing the facts from both standpoints and giving preference to those which, in the court's opinion, preponderate to *such an extent as to make the choice in the interest* of justice. Unless the right to choose between conflicting facts or assertions exists, the court could never determine a motion under this section *on the facts*. For if the mere assertion by the Government of its own convenience and the convenience of its witnesses were sufficient to stay action, we would be confronted with a power to paralyze judicial discretion, beside which the devastating effect of the historic *liberum veto* ("Nie Pozwalan" — "I don't permit") of the Polish nobles in their Diet (1572–1697) would dim into insignificance.

As I cannot so interpret the meaning of the section, I conclude that the showing in this case warrants transfer to the Northern District of Illinois, Eastern Division.

C. *The Supreme Court did not Pass on the Facts*

This conclusion is reached on the conviction that the Supreme Court, in reversing the order of dismissal, did so solely on the ground that the doctrine of *forum non conveniens did not apply*

[1] 28 U. S. C. Sec. 1404 (a).

to antitrust actions. It did not undertake to determine whether the findings were supported by the evidence or there was abuse of discretion. The opinion of Mr. Justice Rutledge very pointedly states that the *sole question* which the Court was deciding was the applicability of the doctrine to cases of this character. The portions of the opinion which posit the problem read:

> The *principal question*, and the *only one* we find it necessary to consider, is whether the choice of forums given to the plaintiff by Section 12 is *subject to qualification* by judicial application of the doctrine of forum non conveniens. * * *
>
> The *only question* presented concerning the court's power is whether, having jurisdiction and venue of the cause and personal jurisdiction of the defendants, the court also *was authorized to decline to exercise its jurisdiction upon findings, without abuse of discretion*, that the forum was not a convenient one within the scope of the non-statutory doctrine commonly, though not too accurately, labeled *forum non conveniens*.
>
> It would serve no useful purpose to review in detail the reasoning or the authorities upon which the District Court ruled the doctrine applicable in such cases as this, or therefore the further groundings upon which it proceeded in holding the forum inconvenient. *For the view has prevailed without qualification during the life of Sec. 12, thirty-four years, that the choice of venues expressly given to the plaintiff is not to be qualified by any power of a court having venue under any of the section's alternatives to decline to exercise the jurisdiction conferred.* None of the decisions

> on which the District court relied, suggested, much less decided, that such a power exists. This therefore is a case of first impression, seeking departure from long-established practice. Moreover, the analogies drawn from other types of cases in which the doctrine has applied cannot survive in the face of the section's explicit terms and the patent intent of Congress enacting it."[45] [Emphasis added.]

The sufficiency of the facts, therefore, not having been determined by the Supreme Court, their revaluation is before me. On such revaluation, I conclude that the motion to transfer should be granted.[46]

Dated this 12th day of October 1948.

LEON R. YANKWICH, *Judge.*

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[45] *United States* v. *National City Lines, Inc.*, 1948, 334 U. S. 573, 575–578.

[46] After the foregoing opinion had been completed, I received a copy of the opinion of Judges Gunnar H. Nordbye and Matthew M. Joyce, of the District of Minnesota, in five companion cases—*Hayes* v. *Chicago, Rock Island & Pacific R. R. Co.*; *Hughes* v. *Chicago, Rock Island & Pacific R. R. Co.*; *Grulkey* v. *Chicago, Rock Island & Pacific R. R. Co.*; *Murphy* v. *Chicago, Rock Island & Pacific R. R.*; *Schirf* v. *Chicago, Rock Island & Pacific R. R. Co.* (Nos. 2719–2773 Civil, not yet published) rendered on September 25, 1948. In these actions, which arose under the Federal Employer's Liability Act, the defendant moved to change venue, for the convenience of parties and witnesses, under Section 1404 (a), 28 U. S. C. In granting the motion, the two judges reached the same conclusion I do on two points: (1) that the transfer provision applies to *all* civil cases, including those which—like the Federal Employer's Liability cases—are brought under a special venue statute, and (2) that it may be invoked in pending cases.

EXHIBIT C

Judgment and Order of Transfer signed October 27, 1948, and Entered by Clerk October 28, 1948

Findings of Fact and Conclusions of Law having heretofore been signed by the Court, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the above-entitled cause be and the same hereby is transferred to the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this cause be and the same hereby is dismissed as to defendant American City Lines, Inc., a corporation.

IT IS FURTHER ORDERED that the respective motions of each defendant for a more definite statement, and the motions of defendants National City Lines, Inc., American City Lines, Inc., Pacific City Lines, Inc., and Mack Manufacturing Corporation to dismiss or, in the alternative, to quash service of summons, be and each of them is hereby denied.

Done in open court this 27th day of October 1948.

LEON R. YANKWICH,
United States District Judge.

Exhibit D

Order Staying Transfer Signed November 29, 1948

This Court having previously entered an order on November 1, 1948, staying execution of the judgment and order entered on October 28, 1948, transferring this action to the United States District Court for the Northern District of Illinois, Eastern Division, until the 2nd day of December 1948, and it further appearing to the Court that the plaintiff intends to file with the Supreme Court of the United States on or before December 13, 1948, a motion for leave to file a petition for writ of certiorari under Section 1651 of Title 28, United States Code, to review said order of judgment and transfer.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the execution of the judgment and order entered on October 28, 1948, transferring the above-entitled cause to the United States District Court for the Northern District of Illinois, Eastern Division, be and it is hereby stayed until 5 p. m., December 13, 1948, and if it appears of record in this Court, on or before said date, by affidavit executed by one of the attorneys for the plaintiff herein, that the above-mentioned motion for leave to file a petition for writ of certiorari has been filed with the Supreme Court by the plaintiff, the execution of the judgment and order of transfer entered on October 28, 1948, shall be further stayed until twenty days after the Supreme Court shall have taken

final action with respect to the above-mentioned motion for leave to file a petition for certiorari either by denying said motion or, if the motion is allowed, by affirming or reversing the judgment and order of transfer entered by this Court on October 28, 1948.

Done in open Court this 29th day of November 1948.

LEON R. YANKWICH,
United States District Judge.

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No. 269 Miscellaneous

In the Supreme Court of the United States

OCTOBER TERM, 1948

UNITED STATES OF AMERICA, PETITIONER

v.

NATIONAL CITY LINES, INC., PACIFIC CITY LINES, INC., FIRESTONE TIRE & RUBBER COMPANY, GENERAL MOTORS CORPORATION, PHILLIPS PETROLEUM COMPANY, MACK MANUFACTURING CORPORATION, STANDARD OIL COMPANY OF CALIFORNIA, AND FEDERAL ENGINEERING CORPORATION

ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

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No. 269 Miscellaneous

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ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court on respondents' motions to transfer the action to another district is reported in 80 F. Supp. 734. A copy of this opinion is set forth in the Appendix to the Government's

petition for certiorari (pp. 20-43) and a certified copy of the opinion has been filed with this Court. An opinion by the district court and an opinion by this Court, rendered at a prior stage of the present proceeding, are respectively reported in 7 F. R. D. 456 and 324 U. S. 573.

JURISDICTION

The date of the order and judgment of the district court sought to be reviewed is October 28, 1948.

The jurisdiction of this Court is invoked under Section 1651(a) of Title 28, United States Code (formerly Section 262 of the Judicial Code, 28 U. S. C. 377), as enacted by Public Law 773, 80th Cong., 2d Sess.

Section 2 of the Act of February 11, 1903, as amended (15 U. S. C. 29), confers upon this Court exclusive appellate jurisdiction of civil suits brought by the United States under the Sherman Act. Grant of the common law writ of certiorari, as authorized by Section 1651(a) of Title 28, United States Code, is sought in aid of such exclusive appellate jurisdiction.

The following decisions sustain the power and jurisdiction of this Court to review the order and judgment review of which is herewith sought:

United States Alkali Export Assn., Inc. v. *United States*, 325 U. S. 196;

De Beers Consolidated Mines, Ltd. v. *United States*, 325 U. S. 212.

QUESTION PRESENTED

Whether Section 1404(a) of Title 28, United States Code, applies to proceedings under the antitrust laws governed by the venue provisions of Section 12 of the Clayton Act.

STATUTES INVOLVED

Title 28, United States Code, Section 1651(a), provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions agreeable to the usages and principles of law.[1]

Title 28, United States Code, Section 1404(a), provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Section 12 of the Act of October 15, 1914, 38 Stat. 730, 15 U. S. C. 22, known as the Clayton Act, provides as follows:

> That any suit, action, or proceeding under the antitrust laws against a corporation may

[1] The reviser's notes state that this section is expressive of the construction placed upon Section 262 of the Judicial Code (28 U. S. C. 377) by this Court in *U. S. Alkali Export Assn., Inc.* v. *United States*, 325 U. S. 196, and *DeBeers Consolidated Mines, Ltd.* v. *United States*, 325 U. S. 212 (H. Rep. No. 308, 80th Cong., 1st Sess., p. A145).

be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

STATEMENT

On April 10, 1947, the United States filed a civil suit in the Southern District of California charging the respondents with violating Sections 1 and 2 of the Sherman Act.[2] Respondents' motions to dismiss the action upon the ground that the Southern District of California is not a convenient forum for the trial were sustained by the district court, and a judgment dismissing the complaint, without prejudice to institution of a similar proceeding against the same respondents in a more appropriate and convenient forum, was entered on October 15, 1947. On appeal to this Court, the judgment of dismissal was reversed. The Court held that Congress, when it enacted Section 12 of the Clayton Act in order to enlarge the venue of proceedings under the antitrust laws, intended to leave no room for "judicial discretion to apply the doctrine of *forum non conveniens* so as to deprive the plaintiff of the choice [of venue] given by the

[2] The present respondents include all of the respondents in *United States v. National City Lines*, 334 U. S. 573, except American City Lines, Inc. The judgment entered by the district court on October 28, 1948, dismissed the cause as to American City Lines, Inc. (see petition for writ of certiorari, note 5, p. 6).

section." *United States* v. *National City Lines, Inc.*, 334 U. S. 573, 588.

After the district court had received the mandate of this Court, the various respondents on August 5, 1948, filed notices that they would move the court on September 20, 1948, pursuant to their respectively annexed motions, to transfer the action to the United States District Court for the Northern District of Illinois, Eastern Division. All of these motions were based upon Section 1404(a) of Title 28 of the United States Code and, in substance, are the same. The motion made by National City Lines, Inc., American City Lines, Inc., and Pacific City Lines, Inc., which is representative of all the others, is set forth in the Appendix to the Government's petition for writ of certiorari (Exhibit A, pp. 19-20). A certified copy of the motion has been filed with this Court.

On October 12, 1948, the district court filed an opinion holding that Section 1404(a) of Title 28 of the United States Code applies to the present action.[3] The grounds which the court gave for this conclusion were that the language of Section 1404(a) makes it applicable to all civil actions, including those under the antitrust laws, and that the legislative history of the section supports the view that it applies, without exception, to every civil action brought in a federal district court.

[3] This opinion is set forth in the Appendix to the petition for certiorari, Exhibit B, pp. 20-43.

The court also ruled that the facts of the particular case were such as to call for exercise of this power. Accordingly, judgment and order transferring the cause to the United States District Court for the Northern District of Illinois, Eastern Division, was entered on October 28, 1948.[4]

The Government on December 10, 1948, filed with this Court a motion for leave to file a petition for writ of certiorari pursuant to Section 1651(a) of Title 28, United States Code. By an order entered by this Court on December 20, 1948, the case has been assigned for hearing on the motion for leave to file petition for writ of certiorari.

SUMMARY OF ARGUMENT

I

The common law writs which this Court is authorized to issue in aid of its appellate jurisdiction have traditionally been used to confine an inferior federal court to its lawful jurisdiction or to compel it to exercise its authority when it is its duty to do so. The present case comes squarely within such traditional use since the writ is sought to compel the district court to adjudicate the action pend-

[4] The judgment and order of transfer appear in the Appendix to the petition for certiorari (Exhibit C, pp. 44). By subsequent orders of the district court, execution of the order of transfer has been stayed until 20 days after this Court shall have taken final action on the Government's motion for leave to file petition for writ of certiorari now pending in this Court (see Government's petition for writ of certiorari, pp. 8-9).

ing before it, in conformity with the requirements of the statute alleged to be controlling. A further reason for granting the writ is that there is no other available remedy for the correction of the injury caused the petitioner by the judgment which it challenges. And the petition for certiorari presents a question which is of substantial public importance, namely, a question as to the authority of district courts which affects every civil proceeding under the antitrust laws against a corporation. Until this question is settled by this Court, it will constantly plague courts and litigants.

II

By Section 12 of the Clayton Act, Congress provided special venues for civil suits under the antitrust laws and granted to the plaintiff in such a suit the right to trial in the venue of his choice. The compilers of the United States Code did not include these venue provisions in Title 28 of the Code.

The purpose of Public Law 773, 80th Cong., 2d Sess., was to codify, rearrange, and clarify Title 28, and to eliminate obsolete material. The Committee reports on the bill, its Congressional sponsors, and its draftsmen gave repeated assurances that they had scrupulously avoided making any controversial change in existing law. No statement or suggestion was ever made, so far as we have found, that the bill would repeal any right as

to place of trial conferred by Section 12 of the Clayton Act.

Public Law 773 codified the numerous venue provisions previously included in Title 28 of the United States Code. Several of these provisions were drawn from special venue statutes and serious doubt had long existed as to whether special venue statutes permit any application of the doctrine of *forum non conveniens*.

Section 1404(a) of Public Law 773 provides that a district court may, for the convenience of witnesses and parties, transfer "any civil action" to another district where it might have been brought. The section serves two useful purposes. First, it establishes that the doctrine of *forum non conveniens* applies to any civil action as to which the applicable venue provisions are codified by Public Law 773, whether or not these venue provisions are derived from a special venue statute. Second, the section implements the *forum non conveniens* doctrine by providing authority to transfer the action to another district, whereas previously when a case was found to come within the doctrine the only available remedy was the less efficient and more drastic one of outright dismissal of the action.

The foregoing construction of Section 1404(a) gives to the words "any civil action" full application within the field as to which Congress was legislating—the actions and remedies codified in the revised Title 28. The construction is also sup-

ported by the principle that repeals by implication are not favored and by the principle that provisions of a statute which is of general application leave unimpaired prior legislation directed specifically to a given subject unless the later statute expressly indicates otherwise.

ARGUMENT

The sole question which the Government raises here is whether Section 1404(a) of Title 28, United States Code, applies to proceedings under the antitrust laws which are governed by the venue provisions of Section 12 of the Clayton Act. If, as we urge, Section 1404(a) does not apply to such a proceeding, the district court had no authority to transfer this case to another district. We do not raise the question whether the district court improperly exercised its authority, if it should be held, contrary to our contention, that Section 1404(a) applies to the present proceeding.

I

The Case Is an Appropriate One for Exercise by This Court of Its Discretionary Power to Issue Certiorari under the "All Writs" Section of the Judicial Code

There can be no doubt as to the power and jurisdiction of this Court to issue the writ which is here sought. The common law writs in aid of appellate jurisdiction (presently authorized by Section 1651(a) of Title 28, United States Code) have been frequently granted to review interlocutory orders

or judgments.[5] The question is, therefore, not as to the power of the Court to grant the writ, but whether, considering all the circumstances, this is an appropriate case for exercise of the power. See *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 26.

"The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche* case, *supra*, p. 26. The present case falls squarely within this definition of the function of the writ. The basis of the Government's motion here is that the district court has declined to retain jurisdiction of and to adjudicate the cause, in contravention of its statutory duty to do so. See *United States* v. *National City Lines, Inc.*, 334 U. S. 573, 582, 588-589. This Court has in numerous like cases issued one of the common law writs (formerly authorized by Section 262 of the Judicial Code) to review the alleged failure of an inferior court to exercise powers of adjudication imposed upon it by law.[6]

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[5] *Ex parte Simons*, 247 U. S. 231; *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86; *Ex parte United States*, 287 U. S. 241; *McCullough* v. *Cosgrave*, 309 U. S. 634; *Ex parte Kawato*, 317 U. S. 69; *Ex parte Peru*, 318 U. S. 578; *United States Alkali Export Assn., Inc.* v. *United States*, 325 U. S. 196; *DeBeers Consolidated Mines, Ltd.* v. *United States*, 325 U. S. 212.

[6] Examples of action of this kind which have been reviewed by such writ are: Transfer of a cause of action to the equity side of the court (*Ex parte Simons*, 247 U. S. 231); appoint-

The common law writs which the Court is authorized to issue in aid of its appellate jurisdiction may not properly be employed as mere substitutes for appeal. *Ex parte Fahey*, 332 U. S. 258, 260. Accordingly, an important, although not necessarily controlling, consideration bearing upon allowance of the writ is whether "other adequate remedy is available" for correction of the alleged error of the inferior court. *Ex parte Peru*, 318 U. S. 578, 584; *DeBeers Consolidated Mines, Ltd.* v. *United States*, 325 U. S. 212, 217.

In the present case an appeal, following entry of final judgment, would not be an adequate remedy for the injury caused by erroneous transfer of the action from the district of the plaintiff's choice.[7]

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ment of an auditor to take evidence and make a report on factual issues prior to jury trial (*Ex parte Peterson*, 253 U. S. 300, 305-306); referring a patent infringement suit to a master for trial (*McCullough* v. *Cosgrave*, 309 U. S. 634; *Los Angeles Brush Mfg. Co.* v. *James*, 272 U. S. 701); abating, for the duration of the war, a suit brought by a resident alien enemy (*Ex parte Kawato*, 317 U. S. 69).

[7] Respects in which the plaintiff may be injured by the transfer include delay in obtaining trial in the district of transfer, disruption of the work of the Government's legal staff in the district of original suit, and additional expense of trial. (See Gov. brief (p. 26) in *National City Lines* case, 334 U. S. 573).

The history of the criminal antitrust proceeding instituted in the court below against the National City Lines defendants serves to document the foregoing elements of injury. On August 14, 1947, the court ruled that the case should be transferred to the Northern District of Illinois, Eastern Division. *United States* v. *National City Lines, Inc.*, 7 F. R. D. 393. The case has not yet been tried although the Government has constantly pressed for early trial. It is now set for trial on February 14, 1949. The transfer has required trips to Chicago by members of the Antitrust Division's

If judgment is for the plaintiff, it has no means of redress for the injury caused by the transfer. If judgment is for the defendant and if the plaintiff, on appeal, should urge that the judgment should be set aside because of error in transferring the cause the plaintiff would be inviting a cure worse than the disease. To win on such ground would mean that the cause would be retried *ab initio* in the district in which suit had started, in lieu of a possible reversal and prompt entry of judgment granting the relief to which the plaintiff was entitled. Moreover, even this doubtful remedy might not be open to the plaintiff. Since error in the venue is a defense which may be waived (*Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 168), prosecution of the action in the district of transfer might be held to constitute a waiver of such defense.

If the Government's motion is well founded, the order of transfer frustrates the policy which Congress established when it passed the Clayton Act in 1914, and which Congress has adhered to ever since, namely, that in a suit under the antitrust laws against a corporation the plaintiff is entitled

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Los Angeles staff, resulting in absences from Los Angeles as follows: the Government's chief trial counsel, 48 days; a second staff member, 14 days; a third staff member, 13 days. When trial takes place these three members will have to be away from Los Angeles for at least two months—six to eight weeks of actual trial, with a minimum of two additional weeks required for pre-trial preparation, post-trial proceedings, and travel.

to have his case tried in the district of his selection if such district is among those specified by the statute. The grounds upon which this Court issued the writ of certiorari in *United States Alkali Export Assn., Inc.* v. *United States*, 325 U. S. 196, 204, are therefore directly applicable: "The hardship imposed on petitioners by a long postponed appellate review, coupled with the attendant infringement of the asserted Congressional policy * * *, together support the appeal to the discretion of this Court to exercise its power to review the ruling of the district court in advance of final judgment."

The question presented for decision here is clearly of substantial public importance. The issue as to the extent of the authority conferred upon district courts by Section 1404(a) of Title 28, United States Code, affects the conduct of every civil suit under the antitrust laws against a corporation brought in a federal district court. The issue, until settled by this Court, will constantly plague both litigants and district courts.[8] In contrast with the *Alkali Export Assn.* case, where the question of statutory construction arose for the first time 27 years after enactment of the applicable statute, the issue in the present case was raised and decided within less than two months after the effec-

[8] The similar question of the application of Section 1404(a) to suits under the Federal Employers' Liability Act has already resulted in decisions in at least nine cases. See Government's petition for certiorari, p. 12.

tive date of the new statute.[9] Moreover, even in those cases in which district courts rule adversely to requested transfers, interjection of the issue of the convenience of the forum tends to frustrate "Congress' declared policy of expediting this type of litigation." *United States* v. *National City Lines, Inc.*, 334 U. S. 573, 589-591.

The Government does not favor impairment of the policy against piece-meal appellate review. Its position is that to grant the review here sought will not operate to impair this policy. The question of the statutory authority of district courts, to which the requested review is confined, is necessarily involved in every antitrust proceeding governed by the venue provisions of Section 12 of the Clayton Act and allowance of review will forever set this question at rest. The question therefore differs sharply in character and in public importance from that which would be presented if a special writ were sought to review a ruling granting or denying transfer of an action where the alleged error was, not absence of authority to order transfer, but improper exercise of such authority.

United States v. *Rice*, 327 U. S. 742, upon which respondent National City Lines, Inc., has relied (Brief in opposition, pp. 5-6), is irrelevant in the present connection because the Court grounded its

[9] The Act of June 25, 1948, Pub. Law 773, 80th Cong., 2d Sess., which enacted Title 28, United States Code, provides in Section 38 that the provisions of the Act shall take effect on September 1, 1948.

ruling against issuance of mandamus upon the conclusion that the governing federal legislation evidenced Congressional intent that rulings ordering remand of a case which had been removed from a state to a federal court should not be subject to appellate review in any form, prior to entry of final judgment. It is established that Congress had not similarly intended to foreclose all judicial review of interlocutory rulings in proceedings under the antitrust laws. *United States Alkali Export Assn., Inc.* v. *United States, supra; DeBeers Consolidated Mines, Ltd.* v. *United States, supra.*

II

Section 1404(a) of Title 28, United States Code, Does Not Apply to Suits under the Antitrust Laws and Does Not Amend Section 12 of the Clayton Act by Taking Away the Right, Given by that Section, to Trial in the Venue of the Plaintiff's Choice

A Justice of this Court has written that statutes are to be interpreted in the light of the fact that they "are, as it were, organisms which exist in their environment."[10] A part of the environment clearly pertinent to the present problem is the legislation enacted by Congress dealing with the venue and trial of suits under the antitrust laws. "Statutes cannot be read intelligently if the eye is closed to considerations evidenced in affiliated statutes, or in the known temper of legislative opinion."[11]

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[10] Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Columbia Law Review 527, 541.

[11] *Id.*, p. 539.

When Congress passed the Sherman Act in 1890, it provided in Section 7 that suit for triple the damages caused by any violation of the Act might be brought in any federal district court in any district in which the defendant "resides or is found."[12] Section 4 of the Act (15 U. S. C. 4) conferred upon federal district courts jurisdiction of suits by the United States to prevent and restrain violations of the Act and, by virtue of Section 5 of the Act (15 U. S. C. 5), such suit might be brought, where there were two or more defendants, in the district of the residence of any one of them. This resulted because Section 5 authorized any court before which a proceeding under Section 4 was pending to summon before it any non-resident defendant. The court, in exercising the power thus conferred, was not free to consider whether the ends of justice would be more completely served by prosecution of the suit in some other district; the statute "left the complainant free to commence its suit in any Circuit Court [later district court] in which it could find and serve a resident conspirator." *United States v. Standard Oil Co.*, 152 Fed. 290, 296 (E. D. Mo.), affirmed on this point, 221 U. S. 1, 46.

Uniform practice under this statute had established that the plaintiff's choice of venue, if within the statutory limits, was conclusive and that a de-

[12] This section was superseded by Section 4 of the Clayton Act (15 U. S. C. A. 15 and historical note).

fendant could not defeat the plaintiff's choice on the ground of the inconvenience to the defendant of the venue selected. *United States* v. *National City Lines, Inc.*, 334 U. S. 573, 580.

When Congress, by the Clayton Act, undertook to supplement and to render more effective the antitrust policy embodied in the Sherman Act, it broadened the venue provisions applicable to suits under the antitrust laws by providing in Section 12 that any suit thereunder against a corporation may be brought not only, as theretofore, in the district in which the defendant resides or is found, but also in any district wherein it "transacts business." The purpose of this change was to serve the convenience of the plaintiff, so far as bringing suit and conducting trial were concerned, and the grant of venue conferred not merely the right to institute suit in any authorized district but also the right to trial in such district (*National City Lines* opinion, 334 U. S. at 581-588). Such has been the uniform practice under the statute (*id.*, p. 580). Important policy considerations likewise support this view as to its effect (*id.*, pp. 589-592).

When the United States Code was published as an official restatement of the general and permanent laws of the United States (45 Stat. pt. 1), substantially all the statutory provisions governing the venue of suits in federal courts were included in Title 28, which was entitled "Judicial Code and

Judiciary."[13] The compilers of the Code apparently recognized, however, that Sections 4 and 12 of the Clayton Act were among the interlaced provisions for enforcement of the antitrust laws and they included these venue sections, not in Title 28, but in Title 15, Chapter 1, entitled "Monopolies and Combinations in Restraint of Trade" (15 U. S. C. 15, 22).

The question which the petition for certiorari here presents is whether Section 1404(a), Title 28, United States Code, as enacted by Public Law 773, 80th Cong., 2d Sess., amended Section 12 of the Clayton Act by taking away the right which it gave, that a plaintiff who brings suit in any district coming within the specifications of Section 12 may have his action tried in the district in which he brought suit. If Section 1404(a) does take away this right, it thereby partially repealed Section 12. There is such *pro tanto* repeal although Section 12 does not in *haec verba* confer right to trial in the chosen venue; rights which have been held to be conferred by a statute are as much a part of it as rights which the statute grants in specific terms.[14] Moreover, there is such repeal notwithstanding the fact that Section 1404(a), if applicable to suits brought under the venue provisions of Section 12 of the Clayton Act, would not repeal that section *in toto*

[13] See 28 U. S. C. 41 (25), 43, 101-114, 116; 28 U. S. C., 1940 Ed., 119, 121, 143, 163, 172, 177, 181, 728, and 762.

[14] See *Kirkland* v. *Atlantic Coast Line R. Co.*, 167 F. 2d 529 (C. A. D. C.), certiorari denied, 335 U. S. 843.

but would merely repeal the right of greatest substance which it confers.[15] To construe Section 1404(a) as a *pro tanto* repeal of authority conferred by Section 12 "would require a clear expression of that purpose by Congress". *United States Alkalai Export Assn., Inc., v. United States*, 325 U. S. 196, 206.

In determining whether Section 1404(a) effected such repeal, it is appropriate and necessary to look to the nature, scope, and legislative history of the statute of which it is a part.

Public Law 773 is entitled "An Act to revise, codify, and enact into law title 28 of the United States Code entitled 'Judicial Code and Judiciary.'". The major purposes of the Act, as expressed in the Committee reports, were to make the provisions of this title the law rather than merely presumptive evidence of the law, to arrange these provisions in a logical order, to remove existing inconsistencies and ambiguities in them, and to eliminate those which had been impliedly repealed or had become obsolete.[16] Since the venue provisions of the Clayton Act had not been incorporated in Title 28 prior to its codification by Public Law 773 (*supra*, p. 18) and since Public Law 773

[15] Place of trial is clearly of far greater importance than place of bringing suit. A right to bring suit in a particular district is a rather empty one if it may be defeated by exercise of discretionary authority, essentially non-reviewable (*supra*, pp. 11-12), to decide whether the district of suit is a convenient forum for trial.

[16] S. Rep. 1559, 80th Cong., 2d Sess., pp. 1-2.

did not bring them within that title, we begin with at least a strong implication that the new statute left these provisions untouched and unaffected.

Public Law 773 is legislation of a highly technical character and its drafting was delegated to a staff of editors of two law publishing firms.[17] In carrying out the task entrusted to them, to rearrange, to simplify, to clarify, and to eliminate the obsolete, the draftsmen of the bill inevitably proposed and drafted some changes in existing law, both in the nomenclature of federal courts and in certain other particulars. But respect must be given to the repeated assurances of the draftsmen, their advisers, the Congressional sponsors of the bill, and the Committee reports, that these changes were confined to minor and wholly non-controversial improvements in existing law.

The report on the bill by the Senate Judiciary Committee states (S. Rep. 1559, 80th Cong., 2d Sess., p. 2):

> Many noncontroversial improvements have been effected which, while individually small in themselves, add up to a very substantial improvement in and modernization of the law relating to the Federal judiciary. At the same time great care has been exercised to make no changes in the existing law which would not meet with substantially unanimous approval.

---

[17] H. Rep. 308, 80th Cong., 1st Sess., pp. 2-3.

The report of the House Judiciary Committee briefly describes, under the heading "Examples of Changes in Law", changes which the bill would effect (H. Rep. 308, 80th Cong., 1st Sess., pp. 5-7). Concerning the proposed Chapter 87 of Title 28, entitled "District Courts; Venue," the report states (p. 6):

> So also, minor changes were made in the provisions regulating the venue of district courts in order to clarify ambiguities or to reconcile conflicts. These are reflected in the reviser's notes under sections 1391-1406.

Various other statements by those chiefly responsible for the codification, that they had scrupulously avoided making any controversial change in the law, are set forth below.[18]

---

[18] Congressman Keogh, Chairman of the House Committee on Revision of the Laws (the functions of which were, by the Congressional Reorganization Act, vested in Subcommittee No. 1 of the House Judiciary Committee), stated as to the revision of Titles 18 and 28 of the Code undertaken by his Committee (Hearings before Subcommittee No. 1 of House Judiciary Committee on H. R. 1600 and H. R. 2055, 80th Cong., 1st Sess., p. 6):

> The policy that we adopted, which in my mind has been very carefully followed by the revisers and by the staffs of the publishing companies as well as the employees of the committee, was to avoid wherever possible and whenever possible the adoption in our revision of what might be described as controversial substantive changes of law.

Congressman Keogh further stated (*id.*, p. 11):

> We have sought to avoid as far as possible, Mr. Chairman, any substantive changes that did not meet with unanimity of opinion.

When the bill came before Congress for action, it was treated on a basis consistent only with the premise that it represented, except for minor, noncontroversial changes, a codification of existing law. The bill was presented to both the Senate and the House via the consent calendar, rules were suspended, and aside from certain provisions relating to the United States Tax Court which were eliminated before passage, the bill passed practically without debate.[18] In the Senate, some 70 Committee amendments were adopted *en bloc*.

In the course of consideration of the bill on the floor of the House and Senate, no reference whatsoever was made to Section 1404(a). Nor was there any reference to Section 12 of the Clayton Act in the Committee reports on the bill, in the House hearings on the bill, or in the reviser's notes.

Circuit Judge Maris, chairman of the Judicial Committee authorized by the Judicial Conference to serve in an advisory capacity, testified (*id.*, p. 19):

> Existing inconsistencies and ambiguities have been removed and obsolete and archaic provisions eliminated or modernized. At the same time care has been taken to make no changes in the existing laws which would not meet with substantially unanimous approval.

The chief reviser selected by the publishing firms to supervise the work of their staffs in codifying titles 18 and 28 testified (*id.*, p. 24):

> The Advisory Committee, the Committee of the Judicial Conference on the Revision of the United States Code, the revision staff and all persons concerned in this work, have exercised extreme care to avoid any changes of substantive law, concerning which there might be any controversy.

[18] 93 Cong. Rec. 8550-8559; 94 Cong. Rec. 8108-8111, 8675-8678.

This is the more striking in that the bill was passed by the Senate on June 12, 1948, and by the House on June 16, 1948, only a few days after this Court had on June 7, 1948, rendered its decision in the *National City Lines* case expressly holding, as had always been the established practice, that the *forum non conveniens* doctrine is not applicable to suits under the antitrust laws. If Congress had intended to repudiate an established principle of antitrust law, so recently affirmed by this Court, it is almost inconceivable that it would have done so without adverting in some way, in the statute or in the legislature history, to either the principle or this Court's decision affirming it.

Section 1404(a) provides that district courts may, for the convenience of parties and witnesses, transfer "any civil action" to any other district where it might have been brought. The quoted words are general in their application but the field within which they have general application is the field as to which Congress was legislating. In this instance that field was the codification of Title 28.

Prior to Public Law 773, Congress had passed no legislation which authorized or regulated the judicially evolved rule commonly labeled *forum non conveniens*. At the time that Section 1404(a) took the form in which it was finally enacted, in the bill reported by the House Judiciary Committee on April 25, 1947 (H. Rep. 308, 80th Cong., 1st Sess.), there was serious doubt as to whether this doctrine

could be invoked in any suit which arose under a special venue statute. The dissent in *Baltimore & Ohio R. Co. v. Kepner*, 314 U. S. 44, in which three justices joined, observed (p. 62) that nothing in the language or history of the venue provisions of the Federal Employers Liability Act "differentiates it from the numerous other venue provisions of the Judicial Code," and raised the question whether the holding in the *Kepner* case did not lead to the conclusion that "every such venue provision" operated to eliminate application of the doctrine of *forum non conveniens*. Nor was such doubt dispelled by *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, decided March 10, 1947. The indicated ground of the Court's ruling (pp. 505-506) was that while there was room for application of the doctrine in cases arising under general venue statutes, it was not applicable to cases under special venue statutes. Cf. the concurring opinion in *United States v. National City Lines, Inc.*, 334 U. S. 573 at 597-598.

While there may be some question as to which of the venue provisions codified in Chapter 87 of revised Title 28 are drawn from special venue statutes, at least some of these provisions clearly are of this nature (see sections 1394-1403). Section 1404(a) therefore served two purposes. First, it established that the doctrine of *forum non conveniens* was applicable to any civil action arising under any of the venue provisions which were codified in revised Title 28. Second, it substituted

authority to transfer for the more drastic and inefficient remedy which alone might be employed under the judicially fashioned rule, namely, outright dismissal of the proceeding.

This Court has said that "there is wisely no rule of law forbidding resort to explanatory legislative history no matter how clear the words may appear on 'superficial examination' ". *Harrison* v. *Northern Trust Co.*, 317 U. S. 476, 479. The Court has also said that frequently even when the plain meaning of the words of a statute "did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words". *United States* v. *American Trucking Assns., Inc.*, 310 U. S. 534, 543. "A few words of general connotation appearing in the text of statutes should not be given a wide meaning, contrary to a settled policy, excepting as a different purpose is plainly shown.' " *Id.*, p. 544.

"Repeals by implications are not favored. A law is not to be construed as impliedly repealing a prior law unless no other reasonable construction can be applied." *United States* v. *Jackson*, 302 U. S. 628, 631. "It is a well-settled principle of construction that specific terms covering the given subject-matter will prevail over general language of the same or another statute which might otherwise prove controlling," even though the statute with the general

language is later in time. *Baltimore National Bank* v. *State Tax Comm.*, 297 U. S. 209, 215. And this Court, in an earlier case, set forth the rule as being that "where there are two statutes upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal, or an absolute incompatability, that the special is intended to remain in force as an exception to the general." *Washington* v. *Miller*, 235 U. S. 422, 428.

The legislative history of Section 1404(a), as distinguished from the legislative history of Public Law 773 generally, supports with the view that the section applies only to the venue provisions which were codified and that the section, at the very least, did not repeal rights as to place of trial given by venue provisions not included in Title 28, for the purpose of aiding in enforcement of the antitrust laws.

The testimony of the sole witness who dealt specifically with its venue provisions when hearings were held in the House, fully accords with the above view. This witness was Professor James William Moore of Yale University Law School, whom the draftsmen of the revised Judicial Code had retained as a special consultant. He stated that existing venue provisions had not been altered by the revision, but that two "changes of importance" had been made. One such change was that provided by Section 1406, that a case filed in the

wrong division or district should be transferred to a proper venue. The other, he said, was that Section 1404(a) "introduces an element of convenience which gives the court the power to transfer a case for the convenience of parties and witnesses to another district." (Hearings by Subcommittee No. 1 of House Judiciary Committee on H. R. 1600 and H. R. 2055, 80th Cong., 1st Sess., p. 29).

There was attached as an Appendix to the House report on the bill notes to each of its sections made by the chief reviser employed by the two law publishing houses engaged in drafting the bill (H. Rep. 308, 80th Cong., 1st Sess., pp. 1, 7, A1-A605). The notes on Section 1404(a) are confined to three sentences (*id.*, p. A132). The first sentence states the obvious, that the section "was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper." The third states the grounds upon which transfer of an action may be ordered, the convenience of parties and witnesses. The middle sentence reads: "As an example of the need of such a provision, see *Baltimore & Ohio R. Co.* v. *Kepner*, 1941, 62 S. Ct. 6, 314 U. S. 44, 86 L. Ed. 28, which was prosecuted under the Federal Employers' Liability Act in New York, although the accident occurred and the employee resided in Ohio."

Since the *Kepner* case had engendered doubts as to the situations in which the doctrine of *forum*

non conveniens is applicable (*supra*, pp. 23-24), there was reason for referring to the case as illustrating the need for legislation dealing with the doctrine. But the reviser did not state that Section 1404(a) would overturn the right as to place of trial given by the special venue provisions of the Federal Employers' Liability Act. Even if it should be concluded that this, nevertheless, is what the reviser may have had in mind, he certainly did not declare his meaning with the explicitness which alone would warrant ascribing to Congress adoption of this meaning. An unmistakable expression of meaning would be required; we submit, to support a construction which would be in plain conflict with the repeated assurances by the sponsors of the bill that it made no change in the law of a substantial or controversial nature.

But even if the meaning of the reviser's note were not so obscure, it can hardly be accepted as authoritative evidence of the legislative "intent." In view of all the circumstances surrounding enactment of Public Law 773, particularly (a) the length and technical nature of its provisions, (b) the speed with which it was passed by both Houses, (c) the absence of any debate or reference to this problem, and (d) the repeated assurances given by the sponsors of the legislation that it was unnecessary for the members of Congress to study even the detailed provisions of the bill (not to mention the other legislative materials) because

such changes in law as they made were "minor," "technical," and "noncontroversial," the Government respectfully submits that it would make a mockery of the process of statutory construction by reference to the legislative history for this Court to hold that the reviser's note on Section 1404(a) must be accepted as positive evidence of what Congress "intended."

Finally, we submit that if the reviser's note should be regarded as sufficient to override, with respect to the Federal Employers' Liability Act, all countervailing considerations, and to repeal an absolute right as to place of trial given by that Act, such effect of Section 1404(a) should not be extended to suits under the antitrust laws. For the reviser undoubtedly did not have the antitrust laws in mind, as appears both from the text of his note and from the fact that up to that time no one had even suggested that *forum non conveniens* applied to antitrust cases. The Federal Employers' Liability Act and the antitrust laws are statutes totally different in subject, character and purpose. An intent to change the effect of the venue provisions of the former is not to be taken as evidencing a like intent as to the latter.

CONCLUSION

For the reasons stated, it is respectfully submitted that leave to file the petition for certiorari should be granted, that the writ should issue, and that the order of transfer entered by the district court should be set aside.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 269, MISCELLANEOUS.

UNITED STATES OF AMERICA, PETITIONER,

v.

NATIONAL CITY LINES, INC., PACIFIC CITY LINES, INC., FIRESTONE TIRE & RUBBER COMPANY, GENERAL MOTORS CORPORATION, PHILLIPS PETROLEUM COMPANY, MACK MANUFACTURING CORPORATION, STANDARD OIL COMPANY OF CALIFORNIA, and FEDERAL ENGINEERING CORPORATION.

BRIEF OF NATIONAL CITY LINES, INC., AND OTHER RESPONDENTS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SOUTHERN DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

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Petitioner seeks a review, by the extraordinary common law writ authorized under Section 1651(a) of Title 28, United States Code, of an interlocutory order entered October 28, 1948, by the United States District Court for the Southern District of California, Central Division. The order transferred this civil action instituted in that court to the United States District Court for the Northern District of Illinois, Eastern Division. The complaint in the action charges the respondents with violations of the Sherman Act.

Opinion Below.

The opinion of the District Court rendered on respondents' motions to transfer the action is reported in 80 F. Supp. 734. An opinion by this Court, and the two opinions by the District Court rendered at prior stages of the present civil action and a companion criminal proceeding, are reported respectively in 334 U. S. 573, 7 F. R. D. 393, and 7 F. R. D. 456.

Question Presented.

The Government seeks a writ of certiorari in order to have this Court review directly an order of the District Court transferring for trial to another district, under Section 1404(a) of Title 28, United States Code, as enacted by Public Law 773, 80th Cong., 2d Sess., a civil action under the antitrust laws. The question presented is whether the grant of the extraordinary common law writ is appropriate in this case to review an order, affecting only the place of trial, where the ground of attack is alleged error in the interpretation of a new section of a comprehensive statute.

Statutes Involved.

The Act of June 25, 1948, Public Law 773, 80th Cong. 2d Sess., which is entitled "An Act To revise, codify, and enact into law title 28 of the United States Code entitled 'Judicial Code and Judiciary'," provides in Section 1 that:

> "Title 28 of the United States Code, entitled 'Judicial Code and Judiciary' is hereby revised, codified, and enacted into law, and may be cited as 'Title 28, United States Code, section —', as follows:
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> . . . . . .

§ 1404. Change of venue

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions agreeable to the usages and principles of law."

Section 12 of the Act of October 15, 1914, 38 Stat. 730, 15 U. S. C. 22, known as the Clayton Act, provides as follows:

"Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.".

Statement.

Prior Proceedings.

On April 9, 1947 a criminal indictment was returned in the District Court for the Southern District of California against National City Lines, Inc. (sometimes called National) and the seven other corporate defendants named in this civil action (together with seven individuals, officers of some of the corporate defendants). The complaint in the present companion civil action was filed the next day. The transactions complained of and the charges made

in the indictment and in this civil action are substantially the same. On July 14, 1947 motions were presented to the District Court by all the defendants to transfer the criminal proceeding to the United States District Court for the Northern District of Illinois, Eastern Division (Chicago), pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure,[1] and on August 14, 1947 the District Court rendered a written opinion (7 F. R. D. 393) and entered an order determining that "in the interest of justice" the proceeding should be transferred for trial to Chicago. Defendants have pleaded not guilty and the criminal case has been directed to be tried in Chicago on February 14, 1949. The Government did not attempt to appeal or seek a review by this Court of the order transferring the criminal proceeding for trial in Chicago.

Prior to the decision of the District Court transferring the criminal proceeding, all the defendants had moved to dismiss the present civil action on the ground that the California court was an inconvenient and inappropriate forum. The District Court entered an order on October 15, 1947 dismissing this action, holding that under the doctrine of *forum non conveniens* it had the power to dismiss the action and that the unusual facts of the present case required dismissal of the action "in the interest of justice". The judgment of dismissal was reversed on appeal to this Court (*United States v. National City Lines, Inc.*,

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[1] Rule 21(b) provides: "Offense Committed in Two or More Districts or Divisions. The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged." (18 U. S. C. A. foll. Sec. 687.)

334 U. S. 573), a majority of this Court holding that "*the history of antitrust legislation shows an intent not to limit the choice of forum by the application of the doctrine of forum non conveniens*" and that the venue provisions of the antitrust laws "stand proof" against interference of the application of the doctrine of *forum non conveniens*, although not impregnable to the legislative power of Congress.[2] This Court's decision was rendered June 7, 1948, prior to the approval by Congress on June 16, 1948 of the new Judicial Code.

Present Transfer Order and Opinion of District Court.

Pursuant to notices filed on August 5, 1948, respondents moved the District Court on September 20, 1948 to transfer the civil action to the United States District Court for the Northern District of Illinois.[3] The District Court held that (1) Section 1404(a) was applicable to an action under the antitrust laws, and (2) the unusual facts of the present case called for the exercise by that court of its discretionary power.[4] The Government does not question the propriety of the exercise of discretion assuming that

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[2] See opinion of Judge Yankwich below, 80 F. Supp. 734, 740.

[3] The motion to transfer is set forth in the Appendix to the Government's petition for certiorari (Exhibit A, p. 19-20).

[4] 80 F. Supp. 734, 742. In addition to *Collett* v. *Louisville & Nashville RR. Co.*, 17 U. S. Law Week 2223 (E. D. Ill., Oct. 18, 1948), and *Kilpatrick* v. *Texas & Pacific Ry. Co.* (S. D. N. Y., Nov. 22, 1948), now pending before this court, the District Courts in *Hayes* v. *Chicago, R. I. & P. R. Co.*, 79 F. Supp. 821; *Nunn* v. *Chicago, Milwaukee, St. P. & P. R. Co.*, 80 F. Supp. 745; *White* v. *Thompson*, 80 F. Supp. 411; *Chaffin* v. *Chesapeake & O. Ry. Co.*, 80 F. Supp. 957, and *Richer* v. *Chicago, R. I. & P. R. Co.*, 80 F. Supp. 971, all involving actions under the Federal Employer's Liability Act, gave effect to the language of the section and held that it applied to all civil actions. *Contra, Pascarella* v. *New York Cent. R. Co.*, 81 F. Supp. 95.

the section is applicable to anti-trust proceedings[5] (Brief, p. 9).

The District Court supported its interpretation of Section 1404(a) by the following observations, among others: The section is part of "a revision of the entire Judicial Code, the first one attempted since 1911". The revision "created a new procedural scheme, namely a method of transferring cases from one district to another, which did not exist before". The broadest possible language—"any civil action"—was used. The legislative history of the section, including statements before the Sub-committee of the House Judiciary Committee, confirms that "Section 1404 introduces an element of convenience which gives the court the power to transfer the case for the convenience of parties and witnesses to another district." The reviser's note to the section manifests an intention "to apply the provisions, *except where otherwise indicated, to all civil actions*, of whatever nature." "Whenever, in this revision, the Congress intended either the whole revision or a specific provision in it, *not* to apply they made specific exceptions from the generic phraseology." Section 12 of the Clayton Act, as to where an action "may be brought", does not immunize antitrust actions "against a general transfer enactment of the type under consideration, as the Court has held it protects it from the impact of the doctrine of *forum non conveniens*." "The doctrine of

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[5] In its opinion in the companion criminal case the District Court said (7 F. R. D. 393, 402):

> "But I am satisfied that a trial here would impose *unnecessary hardships on the defendants* and entail unjustifiable expense which it is the object of the new rules of criminal procedure, and especially of the rule under discussion, to avoid. Altogether *the facts spell out the vexatiousness and oppressiveness* which the Supreme Court has warned us to eschew in matters of this character." (Emphasis supplied.)

implied repeal [of Section 12] need not concern us" since Section 1404(a) "merely subjects the choice [of forum] to judicial qualification under definite conditions".[6]

The District Court found (par. 13): "The convenience of the parties and witnesses and the interest of justice require that this suit be transferred to the United States District Court for the Northern District of Illinois, Eastern Division".[7]

The order of the District Court transferring this civil action has been stayed until twenty days after this Court shall have taken final action on this petition.

Section 1404(a) and Its Legislative History.

House Report No. 308, accompanying the bill which, with certain amendments, became Public Law 773, contained as an appendix copious Reviser's Notes "keyed to sections of the revision" and designed to "explain in detail every change made in text."[8] The Reviser's Note with respect to Section 1404(a) is as follows:

> "Subsection (a) was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper. As an example of the need of such a provision, see *Baltimore & Ohio R. Co.* v. *Kepner*, 1941, 62 S. Ct. 6, 314 U. S. 44, 86 L. Ed. 28, which was prosecuted under the Federal Employer's Liability Act in New York, although the accident occurred and the employee resided in Ohio. The new subsection requires the court to determine that the

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[6] 80 F. Supp. 734, 736, 737, 738, 742, footnote 31.

[7] An authenticated copy of the findings of fact and conclusions of law of the court below has been filed with this Court.

[8] H. Rep. No. 308 accompanying H. R. 3214, 80th Cong. 1st Sess., Apr. 25, 1947. (Tit. 28, U. S. Code Congressional Service, p. 1692, 1699).

transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so."

The plan for a comprehensive revision of Title 28 originated in 1943 with the House Committee on Revision of the Laws. This committee retained two law publishing companies experienced in preparation of annual supplements to the United States Code and the revision was supervised by a staff of expert revisers headed by a former chief of the Appellate Section, Criminal Division, Department of Justice,[9] an Assistant United States Attorney,[10] and a well known author.[11] The Committee had the benefit of the advice of an advisory committee of well known jurists, attorneys and law professors,[12] and two special consultants, experienced in the preparation of the Federal Rules of Criminal and Civil Procedure,[13] as well as a committee of the Judicial Conference[14] and

[9] William W. Barron.

[10] Frank J. Parker, Asst. U. S. Attorney, E. Dist. N. Y.

[11] Theodore W. Graske.

[12] Floyd E. Thompson, former Chief Justice, Illinois Supreme Court; Justin Miller, former Associate Justice, U. S. Court of Appeals, District of Columbia; John B. Sanborn, Judge, U. S. Court of Appeals, 8th Circuit; John J. Parker, Senior Judge, U. S. Court of Appeals, 4th Circuit; Walter P. Armstrong, former President American Bar Association; John Dickinson, professor, Univ. Penn. Law School, former U. S. Asst. Attorney General.

[13] Alexander Holtzoff (now U. S. District Judge, then Special Assistant to the Attorney General, former Secretary of Supreme Court Advisory Committee on Federal Rules of Criminal Procedure) and James W. Moore, professor of Law, Yale University (Chief Research Assistant to Committee on Rules of Civil Procedure; author of Moore's Federal Practice).

[14] Chief Justice Stone, acting for the Judicial Conference, appointed Albert B. Maris, Judge, United States Court of Appeals, Third Circuit, William F. Smith, Judge, United States District Court, New Jersey, and Clarence G. Galston, Judge, United States District Court, Eastern District, New York, as an Advisory Committee to represent the Judicial Conference.

a committee of Supreme Court Justices.[15] Initial drafting was done by the revisers and the two law publishing companies. Each of the four drafts, together with Reviser's Notes, was submitted to the advisory committee, the Judicial Conference committee, and the special consultants to the Judiciary Committee of the House, and circulation was made generally among the judiciary, members of Congress, Government agencies, United States Attorneys, bar associations and interested members of the legal profession.[16] After circulation in each case, the drafts were considered at conferences of the committees and consultants held in February, May and December of 1945 and April of 1946, at which times the drafts were reviewed section by section in the light of questions which had arisen during their preparation.[17] Thereafter, the members of the House Judiciary subcommittee and its legal staff went over the legislation section by section, "and line by line and word by word", to resolve every possible question.[18]

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[15] Chief Justice Stone appointed a Committee consisting of himself as chairman and Associate Justices Douglas and Frankfurter to cooperate with the revisers on material having to do with the Supreme Court.

[16] Statement of Congressman Eugene J. Keogh before Subcommittee No. 1 of House Judiciary Committee, Hearings on H. R. 1600 and H. R. 2055, March 7, 1947 (hereinafter referred to as "Hearings") (Tit. 28, U. S. Code Congressional Service, p. 1940, 1947-48). The work of revision of Title 28 was begun by the House Committee on Revision of the Laws, of which Congressman Keogh was chairman. The functions of this committee became the responsibility of the House Judiciary Committee under the Legislative Reorganization Act but only after the first bills incorporating the revision (H. R. 3498 and H. R. 7124) had been introduced in the 79th Congress by Rep. Keogh (June 9, 1945; July 24, 1946). H. R. 2055 was introduced as a successor bill in the 80th Congress, and it was, in turn superseded by H. R. 3214, which, with amendments, became Public Law 773.

[17] Statement of Justin Miller, Hearings, *id.* at pp. 1950, 1952.

[18] Statement of Congressman Eugene J. Keogh, Hearings (comment of Hon. John M. Robison, chairman, House Judiciary Committee), *id.* at p. 1948.

Section 1404(a) appeared for the first time in the second draft of the revision. It was then accompanied by a Reviser's Note which stated:

> "Subsection (a) is new. It was drafted in accordance with a memorandum of Mar. 7, 1945, from the author of Moore's Federal Practice, stating that recognition should be given the doctrine of *forum non conveniens* permitting transfer to a more convenient forum, even though the venue is proper. The author gave as an example for the need of such a provision *Baltimore & Ohio R. Co.* v. *Kepner*, 1941, 62 S. Ct. 6, 314 U. S. 44, 86 L. Ed. 28, which was prosecuted under the Federal Employer's Liability Act in New York, although the accident occurred and the employee resided in Ohio. The new subsection requires the court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so."

The memorandum of Professor James W. Moore referred to reads:[19]

> "Improper venue results in the dismissal of an action in the federal courts if the point is timely made. I think this result can no longer be justified in this era of easy communication and travel. Provision should be made for transfer when an objection of improper venue is sustained, probably with the imposition of costs and possibly a reasonable attorney's fee. Then I believe we should go further and give some recognition to the doctrine of *forum non conveniens* and permit a court to transfer the case, even though the venue is proper, to a more

[19] At the request of counsel for respondents, Professor Moore has kindly supplied a copy of this memorandum and consented to its use in this brief.

convenient forum. *In my opinion the District Court for the Eastern District of New York should have had the power in the situation presented in the Kepner case, 314 U. S. 44, 62 S. Ct. 6, to transfer the action under the Federal Employer's Liability Act to a federal court in Ohio where the accident occurred and the employee resided and which would have been a proper venue.*" (Emphasis supplied.)

In the third draft, the section was retained, and the Reviser's Note appeared in the final form set forth at page 7 hereof prefaced by the sentence: "Subsection (a) is new." Both the section and the Note were circulated in the third and fourth drafts in 1945 and the early part of 1946, and they were contained in H. R. 7124, introduced July 24, 1946, but not acted upon by the 79th Congress. With minor changes this bill was introduced in the 80th Congress as H. R. 2055; it was referred to the House Judiciary Committee and a hearing was held upon it March 7, 1947.

While the various drafts of the new Code and corresponding Reviser's Notes were given the widest circulation over a two year period, there is no indication that the broad scope of Section 1404(a) or the intention to codify the doctrine of *forum non conveniens* for general application was questioned, or was in any way the subject of controversy.

At the hearing before a Subcommittee of the House Judiciary Committee, Professor Moore, Special Consultant to the Revision Staff, made the following statement concerning changes incorporated in the revision which he regarded as "fairly important":

"VENUE

Venue provisions have not been altered by the revision. Two changes of importance have, however,

been made. Improper venue is no longer grounds for dismissal of an action in the Federal courts. Instead the district court is to transfer the case to the proper venue. See section 1406. And section 1404 introduces an element of convenience which gives the court the power to transfer a case for the convenience of parties and witnesses to another district. Both of these changes were in line with modern State practice; and the provision for change of venue on the grounds of convenience is also embodied in the Bankruptcy Act for corporate reorganization, section 118, Eleventh United States Code, section 518."[20]

Section 1404(a) and the Reviser's Note were carried in their present form in H. R. 2055, and its successor bill, H. R. 3214, from introduction in the House, April 25, 1947, through the Senate amendments (reported out June 9, 1948), and concurrence by the House in the Senate amendments on June 16, 1948. By its terms, Public Law 773 became effective September 1, 1948.

In November 1941, which was prior to the time the revision was undertaken, this Court decided in *Baltimore & Ohio RR. Co.* v. *Kepner*, 314 U. S. 44, that in a suit under the venue provisions of the Federal Employer's Liability Act, a court was, in view of the legislative history of such provisions, precluded from applying the doctrine of *forum non conveniens*. The decision of the District Court (7 F. R. D. 393) in the present action, holding that antitrust actions were subject to the doctrine of *forum non conveniens* (later reversed by this Court), was handed down on October 15, 1947. The work of the Committees and the revisers on the provisions of the new Judicial Code was

[20] Tit. 28 U. S. Code Congressional Service, p. 1969.

finished by the Spring of 1947. Thus, the prime example before them of the principle sought to be affected by Section 1404(a) was the *Kepner* case; the decision in the present case with respect to actions under the anti-trust laws was not handed down until after the work of revision had been completed. The opinion of this Court was not handed down until eight days before the approval of the Act on June 16, 1948. We make these comments because the Government argues that there is some importance in the failure of the Reviser's Notes to refer to the prior decision of this Court, or of the lower court, on the applicability of the doctrine to antitrust actions, an argument to which we will refer at greater length hereafter.

SUMMARY OF ARGUMENT.

I.

The Government is seeking an extraordinary writ in the face of a statutory pattern providing for an appeal only from final judgment. The present case, merely determining that a trial should be held before a Federal District Judge in Illinois instead of a Federal District Judge in California, after a finding by the California court that such transfer was in the interest of justice, is not of such exceptional character and critical public importance as to call for the extraordinary remedy.

A review of the cases in which this Court has utilized the writ reveals that its granting has depended upon an issue of importance so great that failure to grant the writ might have resulted in a frustration and breakdown of the inter-relationship and functioning of some signifi-

cant part of our Federal and constitutional system, such as a question of division of authority between the Federal courts and the State courts[21]; whether a Federal court or another federal department had jurisdiction[22]; the failure of the judicial machinery to function by reason of the wrongful usurpation of power[23]; the arbitrary refusal to exercise a patently existing power[24]; or the denial of the right to a trial by jury[25].

There exists here no showing of importance comparable to the rare cases where the writ has been granted. The District Court relied upon a statute specific in its terms and supported by a Reviser's Note and a legislative history showing an unmistakable purpose to allow the transfer of civil actions in the interest of justice. In essence the Government challenges the interpretation of the statute by the District Court, thus presenting at best a question of error by the lower court.

II.

While in the past a court might infer from the legislative background of a special venue statute an intention on the

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[21] See *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 31 (footnote 5); *Re Chetwood*, 165 U. S. 443; *Ex Parte Metropolitan Water Co.*, 220 U. S. 539.

[22] See *U. S. Alkali Export Association Inc.* v. *United States*, 325 U. S. 196; *Ex Parte Peru*, 318 U. S. 578.

[23] See *De Beers Consolidated Mines, Ltd.* v. *United States*, 325 U. S. 212; cf. *McCullough* v. *Cosgrave*, 309 U. S. 634.

[24] See *Ex Parte United States*, 287 U. S. 241; *McClellan* v. *Carland*, 217 U. S. 268.

[25] See *Adams* v. *U. S.*, 317 U. S. 269; *Ex Parte Simons*, 247 U. S. 231.

part of the legislature that the selection of venue should not be qualified under any circumstances by the doctrine of *forum non conveniens,* there is now an express *statutory purpose* to give full scope to the doctrine and to embrace within the "power of transfer" any and every civil action. The Government's brief itself recognizes that the section extends the scope of the doctrine of *forum non conveniens* and that it now applies to some special venue provisions, but argues that "any civil action" still must be limited to those actions "as to which the applicable venue provisions are codified by Public Law 773" (Brief, p. 8). This argument defies the plain language of Section 1404(a) and its underlying purpose as unequivocally shown by the Reviser's Note and the legislative history. Only some —but not all—special venue provisions are codified in the Revised Code; the special venue provisions of the Federal Employers' Liability Act are not codified; and nothing could be clearer from the Reviser's Note than the purpose that any civil action, including one brought under the Federal Employers' Liability Act which is referred to "as an example," should be subject to the equitable doctrine.

Section 1404(a) merely relates to the place of trial and does not effect any change in substantive law. No question is presented as to the repeal of Section 12 of the Clayton Act which merely provides different venues in which an action "may be brought." The doctrine of *forum non conveniens* was designed as "an instrument of justice." Section 1404(a) is in keeping with the growing trend of transferring a case for trial "in the interest of justice." There is a parallel rule in the Federal Rules of Criminal Procedure (Rule 21(b)), the history of which shows conclusively that

it was intended to apply to anti-trust actions[26]. Applicability of Section 1404(a) to antitrust actions will not create any serious obstacle in the enforcement of the anti-trust laws. A great burden will rest upon any defendant, in a suit instituted under the antitrust laws, to convince a court that it should exercise the transfer power granted, and there is no reason to assume that the power will be abused.

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[26] The history of the rule is set forth by Judge Yankwich in his opinion on the transfer of the companion criminal proceeding. See *United States* v. *National City Lines, Inc.*, 7 F. R. D. 393, 396-97. The following statement was made by the late Judge George Z. Medalie, a member of the advisory committee on the Federal Rules of Criminal Procedure (*id.* at p. 396):

> "Think of what else we have done. It is really a scandal in the Federal Administration, the frequent robbing of the Southern District of New York of its rightful jurisdiction. All large scale financial or business crimes are committed in the Southern District of New York, and they ought to be tried elsewhere; and I feel as you would have with me, if you had preceded me in office—you take these anti-trust cases and other cases involving business operations where indictments are found by the government—a man is blissfully attending to his business in Chicago, committing this, that or the other crime, or doing this, that, or the other good deed, depending on his outlook; and he finds he must go down somewhere in New Mexico, because since his business is nationwide, you can pick out any jurisdiction in the country and indict him there.
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> "If, for example, a business' headquarters are in Chicago, everybody is there; every book and record is there, practically every witness is there on both sides, then try it in Chicago. That is the decent thing to do and accords better with the dignity of our great government that it be done that way, rather than the shabby devices indulged in where we lose our status and our self-respect. Government attorneys cannot, if they appraise themselves properly, afford to engage in that kind of thing, and perhaps it will diminish the abuse, if in fact, it doesn't succeed in its complete abolition."

ARGUMENT.

I.

The present case, involving only the place of trial, is not of such exceptional character and critical public importance as to call for the extraordinary remedy sought.

This Court has repeatedly held that the common law writs are to be reserved for "really extraordinary causes"; they are to be issued "sparingly," in connection with "matters of gravity and public importance." *Ex Parte Fahey*, 332 U. S. 258, 260; *Re Chetwood*, 165 U. S. 443, 462; *Ex Parte United States*, 287 U. S. 241, 248-49.

While the common law writs have been applied for with great frequency to this Court, Chief Justice Stone pointed out in *Ex Parte Peru*, 318 U. S. 578, 585, Note 4, that during the period 1925 to 1943 the Court found circumstances justifying their issuance in *less than ten cases*.

Section 1651(a) of the revised Judicial Code represents a rephrasing of Section 262 of the prior Code which, according to the Reviser's Note, is "expressive of the construction" placed upon Section 262 by this Court in *United States Alkali Export Association, Inc.* v. *U. S.*, 325 U. S. 196, and *DeBeers Consolidated Mines, Ltd.* v. *U. S.*, 325 U. S. 212.[27] These cases, upon which the Government primarily relies, are essentially different from the present case.

The *Alkali* case involved an asserted conflict between a federal district court and the Federal Trade Commission, in the enforcement of the antitrust laws. The question presented was whether *any* court—not merely the court in a particular district—should hear the case. Beyond this,

[27] Tit. 28 U. S. Code Congressional Service, pp. 1867.

petitioners might have been irreparably damaged by the inability to purge themselves of antitrust violations under the guidance of the Commission, without being subjected to the penalties of the Sherman Act. Emphasizing the extraordinary character of the common law writ, Chief Justice Stone justified issuance in that case by analogy to cases involving fundamental questions concerning the operation of the federal system, such as the interference by federal officials with the enforcement of state laws, and by reference to cases involving basic principles of justice, such as deprivation of trial by jury. (325 U. S. 196, 204.)

In the *DeBeers* case, a civil action under the Sherman Act, the District Court granted a preliminary injunction restraining the defendants from disposing of any property pending trial. There was no statutory basis and no precedent for so doing. A majority of the Court granted certiorari on the ground that the action of the District Court was "not mere error, but usurpation of power", "no redress from which could be had by a decision on the merits. (325 U. S. 212, 217). Justice Douglas (joined in by Justices Black, Murphy and Rutledge) vigorously dissented on the ground that such an interlocutory order, even though beyond the power of the lower court, should be reviewed only by the appeal machinery provided, saying (p. 225):

> "In other words, we look to the merits and take the case under § 262 if it appears that the District Court exceeded its authority. But it always exceeds its authority when it abuses its discretion. Thus we must now entertain these appeals on interlocutory orders, though Congress said we should not, in order to determine whether the District Court kept within bounds. Certainly Congress knew that some interlocutory orders might be erroneous when it chose to make them non-reviewable. It did not draw the dis-

tinction now suggested between interlocutory orders which are an abuse of conceded judicial power and interlocutory orders which otherwise exceed judicial authority. Congress moreover knew that if immediate review of interlocutory orders could not be had, no decision on the merits might be able to 'redress any injury done by the order'. But that was the choice which it made. We should respect it."

This case, involving only the place of trial, differs not at all in principle from the great number of cases where this Court has consistently denied use of a common law writ as a means of reviewing an order denying a motion to remand a cause from a federal to a state court.[28]

In *Ex Parte Roe*, 234 U. S. 70, this Court denied mandamus to compel the remand of a cause to a Texas court even though it was recognized that removal of the action under the general removal statute might have been erroneous in view of the special venue provisions of the Federal Employers' Liability Act. Similarly in *U. S. v. Rice*, 327 U. S. 742, the United States had procured removal to a federal court of an action pending in an Oklahoma court to which a restricted member of the Five Civilized Tribes was a party under the special provisions therefor contained in the Act of April 12, 1926 (44 Stat. at l. 329). The federal court thereafter granted remand under the general authority to remand "any cause". This Court denied mandamus pointing out that Congress had repealed an earlier statute permitting appeals from orders of remand for the express purpose of confining review to appeal from the final judgment and holding that the United States must abide, as any ordinary litigant, with the appeal machinery provided. A like purpose to repeal interim appeal provisions and pre-

[28] See *Roche* v. *Evaporated Milk Association*, 319 U. S. 21, 30-31, and cases cited.

clude review of interlocutory orders motivated passage of the Expediting Act.[29]

Justice Brandeis, discussing appellate practice prior to passage of the Expediting Act in *U. S. v. California Cooperative Canneries*, 279 U. S. 553, stated (p. 558):

> "These provisions governing appeals in general were amended by the Expediting Act so that in suits in equity under the Anti-Trust Act 'in which the United States is complainant', the appeal should be direct to this court from the final decree in the trial court. Thus, Congress limited the right of review to an appeal from the decree which disposed of all matters, (see *Collins v. Miller*, 252 U. S. 364, 64 L. Ed. 616, 405 S. Ct. Rep. 347) and it precluded the possibility of an appeal to either court from an interlocutory decree."[29]

The present transfer order, supported by a well-reasoned opinion, should not be subjected to review by issuance of a prerogative writ, in the nature of mandamus as if the District Judge had blatantly usurped power to transfer the cause, without color of authority, or had declined to act in any measure when under a clear duty to exercise jurisdiction. As stated by Justice Cardozo in *Interstate Commerce Commission* v. *U. S.*, 289 U. S. 385, 394:

> "Mandamus is an appropriate remedy to compel a judicial officer to act. It may not be used as a substitute for an appeal or writ of error to dictate the manner of his action." (See also *Roche* v. *Evaporated Milk Association*, 319 U. S. 21, 26)

In this case the purported justification for the writ is that (1) the question of transfer to a different district will

[29] See also *Allen Calculators, Inc.* v. *The National Cash Register Co.*, 322 U. S. 137; *Roche* v. *Evaporated Milk Association*, 319 U. S. 21; *Cobbledick* v. *U. S.*, 309 U. S. 323; *Alexander* v. *U. S.*, 201 U. S. 117.

plague litigants and courts until the matter has been settled by the Supreme Court; (2) the transfer order will frustrate the intent of Congress to give the Government an absolute venue privilege; and (3) petitioners have no adequate remedy by appeal.

The present case is sought to be given importance by reference to other pending antitrust cases. The Government's real concern appears to be not with the particular matter of transfer in this case but with obtaining an accelerated interpretation of Section 1404(a) for use in connection with the other pending cases. It appears that the present case, involving unusual hardship to the defendants, is the only anti-trust case which has been transferred under Section 1404 (a), the government not questioning the discretion of the Court in making such transfer under the present facts. In any event, such considerations have never been held to justify issuance of the writ. Traditionally, this Court has refused, in order to serve the convenience of a party, to permit use of the writ as a substitute for an appeal, and the Government, as other litigants, has been held subject to the rules governing appeals. *U. S.* v. *Rice*, 327 U. S. 742; *Whitney* v. *Dick*, 202 U. S. 132.

The alleged error in transferring the present case does not differentiate it from any other case in which a federal statute may have been erroneously applied. Even if there were error in failing to give effect to the intent of Congress, such error could be cured on a direct appeal from a final judgment. The Government argues (Brief, p. 12) that if it successfully raised the question of venue on an appeal by it from a judgment on the merits in favor of the defendants, it would be necessary for the action to be retried *ab initio* in the California court. Surely it cannot seriously be contended that this Court would be powerless, on appeal,

to correct any ruling found to obstruct Congressional purpose, without compelling needless remand for a new trial.

Finally, the argument of petitioner that this order will cause disruption of its staff, and expense and delay is an attempt to reargue the merits of the motion below. The District Court subjected the application of defendants for a transfer to eight different tests before finding that justice required transfer of the cause.[30] Any hardship or inconvenience to the Government was carefully considered by the court below in determining that defendants established the necessity for a transfer to another district "for the convenience of parties and witnesses, in the interest of justice."[31] Certainly it was never contemplated that such hardship should be the basis for the issuance of a common law writ. Indeed, such an argument was rejected by Chief Justice Stone in *Roche* v. *Evaporated Milk Association*, 319 U. S. 21, 30, and such arguments have been consistently rejected in refusing to review by issuance of the common law writs the denial of a motion for non suit[32] and the denial of a motion to remand a cause from a federal to a state court.[33]

The Government attempts to borrow from the public interest involved in the enforcement of the antitrust laws an urgency and importance of fundamental legal principle

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[30] See *United States* v. *National City Lines, Inc.*, 7 F. R. D. 393, 398 (applying same tests on transfer of the criminal case).

[31] Any possible hardship or inconvenience to the Government has already occurred in view of the accomplished transfer of the criminal case to Chicago where the case is to be tried on February 14.

[32] *Ex Parte Loring*, 94 U. S. 418; and see *Re Chicago, R. I. & P. R. Co.*, 255 U. S. 273 (denying a plea to the jurisdiction); *cf. Ex Parte Perry*, 102 U. S. 183.

[33] *Ex Parte The Park Square Auto Station*, 244 U. S. 412; *Ex Parte Harding*, 219 U. S. 363; *Re Pollitz*, 206 U. S. 323.

which this case does not possess. This case satisfies none of the tests established by this Court for the issuance of the common law writs.[34]

In all equity and good conscience,[35] and in accordance with the usages and principles of law, petitioner should be remitted to its statutory remedy of appeal from the final judgment.

II.

The decision of the District Court that Section 1404(a), in view of its language and legislative history, is applicable to any civil action and that an antitrust action is not immunized is clearly proper.

The illogical nature of the Government's contention that Section 1404(a) has application only to actions arising under the venue provisions of Chapter 87 of the Code is indicated by the inconsistent positions it has taken. In its original petition it stated (p. 17) that the section was in-

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[34] Referring to the cases cited by the Government as authority for the statement that this court has frequently reviewed alleged failure of an inferior court to exercise power of adjudication imposed upon it by law (Brief, p. 10), *Ex Parte Simons*, 247 U. S. 231, and *Ex Parte Skinner & Eddy Corp.*, 265 U. S. 86, involved deprivation of trial by jury; *Ex Parte United States*, 287 U. S. 241, involved refusal by a district judge to issue a warrant of arrest after the return of an indictment; in *Ex Parte Peterson*, 253 U. S. 300, the writ was denied; in *McCullough* v. *Cosgrave*, 309 U. S. 634, the writ was granted to correct persistent disregard of the Federal Rules of Civil Procedure; and in *Ex Parte Kawato*, 317 U. S. 69, abatement of the suit below would have defeated the appellate jurisdiction of this Court.

[35] "Mandamus is an extraordinary remedial process which is awarded not as a matter of right, but in the exercise of a sound judicial discretion. Although classed as a legal remedy, in issuing it a court must be largely controlled by equitable principles." (Justice Taft, *In the Matter of The Skinner & Eddy Corp.*, 265 U. S. 86, 95-96).

tended "to have the valuable but noncontroversial effect of giving to the district courts, in cases where the doctrine of *forum non conveniens* was previously applicable, power to transfer the action to another district, in substitution for the more drastic remedy of dismissing the action upon the ground of the inconvenience of the forum". Apparently realizing that such an arbitrary limitation was without foundation, the Government in its brief shifts its ground to an equally illogical position (p. 8)—that the purpose of Section 1404(a) is that "the doctrine of *forum non conveniens* applies to any civil action as to which the applicable venue provisions are codified by Public Law 773, whether or not these venue provisions are derived from a special venue statute". This present position of the Government defies the plain, broad language of the section. It excludes from the application of the section a considerable number of venue provisions respecting important matters. It disregards the fact that the statute is part of a complete revised code and not merely the codification of an existing law and that it is part of the embodiment of a new procedural scheme. It is in direct contradiction of the clear language of the Reviser's Notes. It would frustrate the fair meaning of various sections of the Code other than Section 1404(a) and would in reality defeat the principal purpose of the enactment.

A.

Language and Framework of the Section.

It is impossible to conceive of any broader language than "any civil action". The phrase used in Section 1404(a), and in many other sections of the new Code, in substitution for such phrases as "all cases", "all suits at law or in equity", and similar phrases, was plainly intended

to embrace all actions, suits, and proceedings. This is apparent from the various sections of the Code and the Reviser's Notes. The same phrase is found in many sections, including Section 1337 (giving the District Courts original jurisdiction "of any civil action" arising "under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies"). The Reviser's Notes to Section 1337 state that the words "civil action" were substituted for "suits"; and certainly "any civil action" in Section 1404(a) must have the same broad meaning as in Section 1337. As appears from Section 1404(b) itself, "any civil action" was intended to be coextensive with "any action, suit or proceeding of a civil nature".

When an exception from the general terms of a chapter or the Code itself was intended, specific provision was made to cover the excepted cases. For example, in Chapter 171, governing "Tort Claims Procedure", specific provision was made to except thirteen different classes of actions against the Government and government agencies from the general coverage of the chapter (Section 2680). Had any exception from the terms of Section 1404(a) been intended, a proviso to that effect could easily have been inserted. In view of the word by word scrutiny which the various drafts of the revision (and the Reviser's Notes) underwent at the hands of expert consultants and advisers, any suggestion that an exception was intended but overlooked can carry no weight.

In addition, Section 33 of Public Law 773 is significant. It provides that no "inference of a legislative construction is to be drawn by reason of the chapter in Title 28 * * * in which any section is placed, nor by reason of the catchlines used in such title." Section 1404 represents an all-embracing concept dealing with the transfer of cases. In seeking to limit the actions embraced by Section 1404 of

the Code to the particular venue provisions set forth in Sections 1391 to 1403, despite the fact that Section 1404(a) refers to "any civil action," the Government seeks arbitrarily to restrict Section 1404(a) by reference to other sections in Chapter 87 which happen to deal with venue. This is inconsistent with the purpose and intention of Section 33.

B.

Scope of Revision and Reviser's Notes to Section 1404(a).

(1) The Government argues that the only changes intended by the revision were "minor, technical, and noncontroversial" (Brief, p. 29).

It is unreal and unsound to suggest that the new Code effected no significant changes. While it does not deal with matters of substantive law, inevitably a revision so sweeping and comprehensive effected material changes of a procedural nature. The Code sets forth a comprehensive procedural scheme. The change with which we are concerned is of a procedural nature.

In addition to Section 1404(a), a number of important venue changes were made; there were material changes permitting for the first time actions against aliens to be laid in any district (Sec. 1391(d)) and that the Collector of Internal Revenue may sue to recover taxes in the district where the return was filed (Sec. 1396). In this chapter also, the venue provisions for actions relating to orders of the Interstate Commerce Commission were "completely rewritten to give effect to changes recommended by the Judicial Conference of the United States" (Sec. 1398). And provisions for transfer of proceedings from one division of a district court formerly applicable only to the District of Maine, were extended to apply nationally (Sec. 1404(b)). Professor Moore points out, also, that the venue of a patent infringement action "may be considerable broadened" under the

redefinition of corporate residence contained in Section 1391(c). (3 Moore's Federal Practice 2140.)

Section 1404(a) is part of a new concept for treating improper or inconvenient venue. The first consideration was to avoid the dismissal of actions brought in the *wrong* venue by conferring upon district courts the power to transfer actions to other districts. The second consideration was to codify the principle of *forum non conveniens*, avoiding the limitations placed upon the doctrine by the *Kepner* case, and establishing uniform standards governing the transfer of actions. These principles have been enacted into law as Sections 1406(a) and 1404(a) of Title 28, and constitute a completely new scheme for the handling of improper or inconvenient venue.[36] The sections comprise a development of the law, fitting the words of Justice Cardozo that "The law, like the traveler, must be ready for the morrow. It must have a principle of growth."[37]

It does not appear that there was any controversy among the revisers, consultants, or Judiciary Committee members concerning changes made in the course of the comprehensive revision. Any suggestion that the present change may have been "controversial", from the viewpoint of persons other than those who participated in the revision, can have no force in view of the impact of the plain language of the section and the Reviser's Note. The remark of Congressman Keogh as to "controversial changes", cited in the Government's brief (p. 21), merely states that an attempt was made to avoid "controversial substantive changes".

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[36] See memorandum of Professor Moore, *ante* p. 10. Section 1406(a) reads: "The district court of a district in which is filed a case laying venue in the wrong division or district shall transfer such case to any district or division in which it could have been brought." This section first appeared in the revised code as subsection (d) of section 1404 (see Fourth Draft, Feb. 1946, p. 278).

[37] Cardozo, *The Growth of the Law* (1927), p. 20.

The change with which we are concerned was clearly of a procedural, not a substantive, nature. Further, there was no reason at that time to anticipate that repudiation of the *Kepner* limitation would arouse controversy. The fact that the revisers anticipated no later objection to a change does not alter the fact that this and other significant changes were made.[38]

A federal codification of the doctrine of *forum non conveniens* had gained favor, even enthusiasm in the profession[39] and the FELA venue section plus the rule of the *Kepner* case was widely blamed for the undue transportation of actions under the Federal Employer's Liability Act.[40] There is no justification for any inference that the

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[38] For example, Section 2283 of the Code was designed to eliminate the restriction on the power of a district court to enjoin relitigation of a matter in a state court, as found by this Court in *Toucey* v. *N. Y. Life Ins. Co.*, 314 U. S. 118 (see Tit. 28 U. S. Code Congressional Service, p. 1969); and Section 36 of Public Law 773 expanded the power to review decisions of the Tax Court, to avoid the rule of *Dobson* v. *Commissioner of Internal Revenue*, 320 U. S. 489 (see Galston, *An Introduction to the New Federal Judicial Code*, 8 F. R. D. 201, 207).

[39] See Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution* (1945), 45 Col. L. Rev. 1, 24; Braucher, *The Inconvenient Federal Forum* (1947), 60 Harv. L. Rev. 908, 938-39; Note, *Forum Non Conveniens, A New Federal Doctrine* (1947), 56 Yale Law Journal 1234, 1249-50.

[40] See *Hearings Before Subcommittee No. 4, Committee on the Judiciary, House of Representatives, on H. R. 1639 (Jennings Bill), March 28, April 1, 11, and 18, 1947*, particularly the statement of Floyd E. Thompson, a member of the advisory committee on revision of Title 28: "It [this racket] is really stupendous, it is inconceivable to me that one honestly considering the question cannot see the evil and want to have it corrected. I think the opposition to the measure is almost exclusively from the racketeering lawyers themselves and from those with whom they divide the loot" (p. 24); see also *Alabama & Vicksburg Ry. Co.* v. *Journey*, 257 U. S. 111 (upholding orders of Director General of Railroads restricting venue in such suits during first World War), and *Davis* v. *Farmers' Coop. Equity Co.*, 262 U. S. 312, 315 ("* * * the resultant obstruction to commerce must be serious * * *"); Gray, *Venue of Actions* (1947), 33 Am. Bar Asso. Journal 659. DeVitt, *Venue of Actions* (1948), 34 Am. Bar Asso. Journal 454 (written prior to enactment of P. L. 773).

Congress (or the United States Attorney General, who was supplied with each successive draft and the final revision) was unaware of the intention expressed in Section 1404(a) or was in any way misled by it.

(2) The Government argues that if the revisers intended to cure the rule of the *Kepner* case and to subject all civil actions to the discretionary authority created by Section 1404(a), this would have been such a significant change that they would have warned Congress through a public statement of its effect or a more elaborate Reviser's Note (Brief, p. 28). While in reporting the bill whose first section contained an entire code of 2,680 sections, the House Report made only brief mention of the sixteen section venue chapter, it referred the Congress to the Reviser's Notes for a full explanation. Nothing could be more illuminating as to the change than the Reviser's Note which specifically refers to the *Kepner* case.

The common conception of the rule of the *Kepner* case is drawn from the following language in the opinion of Mr. Justice Reed in that case:

> "A privilege of venue, granted by the legislative body which created this right of action, cannot be frustrated for reasons of convenience or expense. If it is deemed unjust, the remedy is legislative * * *" (314 U. S. 44, 54).

The case established the rule that a court had no power to qualify the selection of venue where the legislative history of the particular special venue statute gave the plaintiff an absolute choice.[41]

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[41] *United States v. National City Lines, Inc.*, 334 U. S. 574, 596-97; see Braucher, *The Inconvenient Federal Forum* (1947), 60 Harv. L. Rev. 906, 926.

It would appear to be an act of supererogation to go beyond the Reviser's Note in demonstrating the change made by Section 1404(a). The first sentence stating that the section was drafted "in accordance with the doctrine of forum non conveniens" can only mean that the section is in furtherance of, or fully in keeping with, or in harmony with, the fullest development of the equitable doctrine. The second sentence refers to the "need" (or necessity or urgency) of the section by referring specifically to the *Kepner* case, in which the suit was prosecuted in New York "although the accident occurred and the employee resided in Ohio". Such a reference to the *Kepner* case would appear to be meaningless unless the section intended to devitalize the *Kepner* case.

If there could remain any doubt about the meaning of the second sentence of the Reviser's Note, it is dispelled by reference to the source of that sentence, the memorandum of Professor James W. Moore dated March 7, 1945, in which he first suggested codification of the doctrine of *forum non conveniens*. The fifth sentence of that memorandum states:

> "In my opinion the District Court for the Eastern District of New York should have had the power in the situation presented in the Kepner case, 314 U. S. 44, 62 S. Ct. 6, to transfer the action under the Federal Employer's Liability Act to a federal court in Ohio where the accident occurred and the employee resided and which would have been a proper venue." (See *Ante*, p. 10).

In the second edition of *3 Moore's Federal Practice*, which appeared in December, 1948, the author concludes his discussion of changes affecting venue, stating (¶19.04, p. 2141):

> "The Judicial Code Revision did not change the underlying basic principles of venue. It did, how-

ever, make some substantial changes and certainly put venue on a more workable basis. It adopts the principle of forum non conveniens, but provides for a transfer, not dismissal, of *any* action to a proper and more convenient forum."

Footnote 107 to this text states in part (p. 2141):

"Any action in §1404(a) includes suits subject to special venue statutes, as suits for patent infringement and suits under the Federal Employers' Liability Act, as well as actions subject to the general venue statute."

It is crystal clear that the revisers, the judicial and professional consultants, and the members of the Judiciary Committee of the House and Senate fully intended, in approving Section 1404(a) and the Reviser's Note, to cure the rule of the *Kepner* case—to eliminate the restriction upon the doctrine of *forum non conveniens* with respect to special venue statutes.

If, then, Section 1404(a) applies to Federal Employers' Liability Act actions, there is no basis, in logic or policy, for excluding from its application cases arising under other special venue statutes. Such an assumption would have the completely unwarranted effect of insulating from the transfer authority cases, for example, arising under the Securities Act of 1933,[42] the Securities Exchange Act of 1934,[43] the Public Utility Holding Company Act of 1935,[44] the Investment Company Act of 1940,[45] and certain suits in admiralty,[46] as well as civil actions brought under the antitrust laws, but permitting transfer of virtu-

[42] 15 U. S. C. A., Secs. 77a, 77v.
[43] 15 U. S. C. A., Secs. 78a, 78aa.
[44] 15 U. S. C. A., Secs. 79, 79y.
[45] 15 U. S. C. A., Secs. 80a, 80a-43.
[46] 46 U. S. C. A., Secs. 782, 1128d.

ally all other actions, including actions brought by the United States to collect taxes[47] or for imposition of penalties,[48] cases arising under the Federal Bankruptcy Act,[49] and federal criminal cases.

If Section 1404(a) has no application to actions arising under special venue provisions not included in Chapter 87, as argued by the Government, then, presumably, the provisions of Section 1406(a), as to the transfer of actions where venue was laid in the wrong division or district, could not be applied to such actions. Courts would have no power to transfer such cases to a proper forum; they would have no alternative but to dismiss them. Dismissal in such a case, at the least, would require starting an action all over again, and if the statute of limitations had run, meanwhile, it might be fatal to the claim. In view of the plain meaning of the language of Section 1404(a), and with due regard for the object of its enactment as evidenced by the Reviser's Note, it is believed that no such incongruous result can be countenanced.

(3) Under Section 6 of the Federal Employers' Liability Act[50] and under Section 12 of the Clayton Act, plaintiffs will continue to have the choice of venue according to the terms of those sections. But in these cases, as in all other civil actions, the district courts will have the authority, within the framework of Sections 1404 and 1406, to transfer the actions—whether for improper venue or for the convenience of parties and witnesses in the interest of justice—to another district. Superimposed upon the venue system

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[47] 28 U. S. C. A., Sec. 1396.
[48] 28 U. S. C. A., Sec. 1395.
[49] 11 U. S. C. A., Sec. 518.
[50] 45 U. S. C. A., Sec. 56.

in all civil actions, Section 1404(a) affects the place where an action shall be tried, but leaves unaffected the question of where an action shall be brought. There was no occasion expressly to repeal any special venue statute in this revision.

Dealing as the Court is here "not with an amending act but with an entire code revision", Judge Yankwich pointed out in the opinion transferring this action, "the doctrine of implied repeal need not concern us". The Government insists that the imposition of any conditions on the absolute venue privilege of the Government in antitrust cases is a *pro tanto* repeal of Section 12 of the Clayton Act. Such an argument disregards the new procedural concept upon which Section 1404(a) is founded.

C.

Civil Antitrust Actions Are Not Excluded from the Scope of Section 1404(a).

(1) The rationale of the *Kepner* case was the same as that of the *National City Lines* case previously decided by this Court—that in view of the legislative intent manifested by the history of the particular venue statutes there concerned, a court was precluded from applying the doctrine of *forum non conveniens*. A different and later legislative intent is expressed in Section 1404(a) and the legislative background which was the basis of the previous decisions by this Court in the *Kepner* and *National City Lines* cases is no longer operative. Thus, Section 1404(a) embraces antitrust actions for the same basic reason that it embraces actions under the Federal Employers' Liability Act.

The failure of the Revisers to refer to Section 12 of the Clayton Act does not in any way indicate an intention to

prohibit the broad application of Section 1404(a) to this class of cases. As we have pointed out, the reason for the reference to the *Kepner* case was that, during the period of the revision work and until the Spring of 1947, the *Kepner* case was the prime example before them of the principle sought to be changed by Section 1404(a). There had been no decision, either under Rule 21(b) as to criminal actions under the anti-trust laws, or under the doctrine of *forum non conveniens* as to civil actions under the anti-trust laws, which related to a transfer or a dismissal of such an action. When the District Court transferred the companion criminal action and dismissed the present civil action in the late summer and fall of 1947 it carried out the theory sought to be codified in Section 1404(a). There was, therefore, no occasion for a reference to Section 12 of the Clayton Act. It will be noted that the *Kepner* case was referred to merely "as an example".

The draft containing the section and the illuminating Reviser's Note was widely circulated in 1945, 1946 and 1947, and the proposed statute, together with the Reviser's Note, was submitted to Congress in April, 1947. If any Governmental agency found this section objectionable it had every opportunity, prior to its passage in June, 1948, to express its views.[51]

(2) The lower court in its companion opinion transferring the criminal case under Rule 21(b) of the Federal Rules of Criminal Procedure (which became effective

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[51] It appears that the Attorney General gave close attention to the progress of the revision, and made suggestions for changes and deletions. See letter of Hon. Tom C. Clark, Attorney General, to Hon. Earl C. Michener, Committee on the Judiciary, April 17, 1947 (Tit. 28 U. S. Code Congressional Service, p. 1700). See also, statement of Harold I. Boynton, Special Asst. to the Attorney General, before Subcommittee No. 1 of House Judiciary Committee. *Hearings* (*id.* at p. 1974).

March 21, 1946) reviewed at length the history of that rule and demonstrated that it was intended particularly to embrace antitrust actions. Surely it is not surprising that the present Congress should give effect in Section 1404(a) to the policy expressed in Rule 21(b).

The scheme of the revision of Title 28 was expounded by Hon. Eugene J. Keogh (Chairman of the House Committee on Revision of the Laws, which undertook the revision of Title 28) at the hearing before Sub-committee No. 1 of the House Judiciary Committee, March 7, 1947. In answer to a question as to why Titles 18 and 28 were selected for revision, he stated:

> "We selected 18 and 28, Mr. Chairman, for the reason that those were the two titles that by our experience and information cried out the loudest for a revision and for a restatement and for possible enactment into positive law, and we selected those two titles, too, particularly for the reason that there was pending under the acts granting the authority to the Supreme Court and its advisory committees, *the adoption of the rules of civil procedure and of criminal procedure, and we proceeded upon the hypothesis that the adoption of such rules would necessarily require substantive revision of the then existing laws.*"[52] (Emphasis supplied.)

The scrupulous care with which the revisers attempted to reconcile and adapt Title 28 of the Federal Rules of Civil and of Criminal procedure is clearly shown by reference to the Reviser's Notes throughout. There can be no doubt that the justice and desirability of Sections 1404 and 1406(a) as a broad counterpart of Federal Criminal Rules 19 to 21 (permitting transfer of criminal actions between districts and divisions) must have been recognized by the

[52] Tit. 28 U. S. Code Congressional Service, p. 1945.

revisers, the consultants and all the judges, legislators, United States Attorneys and interested members of the legal profession among whom the various drafts were circulated.[53] As Professor Moore pointed out (*ante*, p. 12), the sections were designed with reference to modern means of transportation, and in accordance with the provisions contained in the Federal Bankruptcy Act and state practice acts, clearly, we submit to bring the administration of justice in federal civil cases up to date.

(3) Section 1404(a) presents no hindrance to the enforcement of the antitrust laws. In *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, this court stated with respect to the doctrine of *forum non conveniens* (Justice Jackson, p. 508): "The doctrine leaves much to the discretion of the court to which plaintiff resorts, and experience has not shown a judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses." Consistent with the standards laid down by this Court in the *Gulf* case, concerning application of the doctrine of *forum non conveniens*, the section gives the plaintiff a choice in which venue to bring an action, and the burden is on the defendant to show that a transfer is required "in the interest of justice."[54]

Our brief before this Court on the earlier appeal (p. 27) pointed out that in all other known antitrust cases in which an application was made to dismiss a suit on the grounds of *forum non conveniens*, the District Court decided, in its

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[53] See, for example, final portion of Reviser's note to Section 1404(b): "This revised subsection extends to all judicial districts and permits transfer of cases between divisions. Criminal cases may be transferred pursuant to rules 19-21 of the new Federal Rules of Criminal Procedure * * *" (Tit. 28 U. S. Code of Congressional Service, p. 1853).

[54] The standards laid down in the *Gulf* decision were followed in applying Section 1404(a) in *Richer* v. *Chi. R. I. & P. R. Co.*, 80 F. Supp. 974 (E. D. Mo., Nov. 19, 1948).

discretion, that the facts did not warrant the application of the doctrine. The order of transfer entered herein was made by a District Court (Judge Yankwich) which has always been very much concerned with the factors urged by the Government in antitrust cases and he recognized that a determination of what is in the interest of justice "imported the exercise of discretion which considers both the interests of the defendant and those of society".

The factors which this Court in the earlier *National City Lines* case found would interfere with the efficient administration of the antitrust laws, if the doctrine of *forum non conveniens* were applicable, are not a problem in the case of a transfer under Section 1404(a). Under the Federal Rules of Civil Procedure, a motion for transfer will have to be made at the same time as other preliminary motions.[55] The question of transfer will be heard along with such other motions, avoiding any additional delay, and whether granted or denied, such an order would not be appealable with the consequent delay of an appeal.[56] A great burden will rest upon the defendants to establish the necessity for a transfer. Once transferred a civil antitrust case will not go upon a merry-go-round of further transfers, but, under the law of the case, will undoubtedly remain in the district to which transferred. If in this district a crowded calendar is an obstacle to early trial, the Attorney General has

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[55] See Rule 12(g), (h), (b), Federal Rules of Civil Procedure.

[56] Appeals in civil antitrust actions wherein the United States is complainant lie from "the final judgment of the district court." (Section 17, Public Law 773; Tit. 28, U. S. Code Congressional Service p. 1644); see also *United States* v. *National City Lines, Inc.*, 334 U. S. 573, 594, and footnote 43.

power, by filing a certificate of public importance, to obtain an expedited hearing.[57] Finally, there will be involved, in the ordinary case, no disruption of the staff of the Department of Justice inasmuch as the files in a transferred matter can be transmitted to the United States Attorney in the new district for processing and trial as in a case initiated there.

Under Section 1404(a) the benefits intended by Section 12 of the Clayton Act are not endangered since the district courts are obliged to consider all the conveniences and other considerations of justice affecting such plaintiffs before making the findings necessary to found a transfer order. On the other hand, to whatever extent Section 12 of the Clayton Act may have been misused in the past or might be misused in the future, the very existence of Section 1404(a) will have a prophylactic effect and will, undoubtedly in large measure, eliminate the need for the transfer authority. Moreover, without the transfer authority of Section 1404(a), defendants in companion criminal and civil cases would be foreclosed from any real benefit under Federal Criminal Rule 21(b).

The applicability of Section 1404(a) to antitrust proceedings is required by the scheme and purpose of the revised Code. It will fairly serve the "interest of justice" in the extraordinary case where it may be appropriate, without interfering with a vigorous enforcement of the antitrust laws.

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[57] On filing of such a certificate, civil antitrust actions are to "be given precedence over others and in every way expedited, and be assigned for hearing at the earliest practicable day." (15 U. S. C. A., Sec. 28).

Conclusion.

The motion for leave to file a petition for certiorari should be denied.

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